

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of Section 621(a)(1))	
of the Cable Communications Policy)	MB Docket No. 05-311
Act of 1984, as amended by the Cable)	
Television Consumer Protection and)	
Competition Act of 1992)	
)	

**COMMENTS OF BELL SOUTH CORPORATION AND
BELL SOUTH ENTERTAINMENT, LLC**

**BELL SOUTH CORPORATION
BELL SOUTH ENTERTAINMENT, LLC**

Richard M. Sbaratta
J. Phillip Carver
Suite 4300
675 West Peachtree Street, N.E.
Atlanta, Georgia 30375-0001
(404) 335-0710

Bennett L. Ross
1133 21st Street, N.E.
Suite 900
Washington, D.C. 20036
(202) 463-4113

Date: February 13, 2006

TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY	1
II.	THE CURRENT FRANCHISING PROCESS IMPEDES VIDEO COMPETITION AND BROADBAND DEPLOYMENT	10
A.	BellSouth's Experiences in Obtaining Traditional Cable Franchises Underscore the Problems with the Local Franchising Process	10
1.	Miami-Dade County, Florida.....	12
2.	DeKalb County, Georgia	14
3.	St. Johns County, Florida	16
4.	The City of Germantown, Tennessee.....	17
5.	The City of Coral Springs, Florida.....	18
B.	The Current Local Franchising Process Interferes With BellSouth's Unified Broadband Network That May Be Used To Provide Video As Well As Other Services.	20
C.	The Current Local Franchising Process Is Irreconcilable With Promoting Broadband Deployment And Undermines The New And Innovative Video Offerings That Rely On Broadband Service	25
III.	THE COMMISSION SHOULD FACILITATE COMPETITION BY ADOPTING EIGHT RULES THAT WOULD STREAMLINE THE LOCAL FRANCHISE PROCESS AND ELIMINATE UNNECESSARY OPPORTUNITIES FOR DELAYING OR PREVENTING COMPETITIVE VIDEO ENTRY	28
A.	Build Out Requirements Should Be Prohibited As A Precondition To A Broadband Video Provider Obtaining A Cable Franchise.....	30
B.	All Cable Franchise Applications By Broadband Video Providers Should Be Ruled Upon Within 90 Days, Or Otherwise Should Be Deemed Granted.	36
C.	LFA-Assessed Fees (or In-Kind Requirements) Beyond Those Authorized By The Act Should Be Prohibited.	38
D.	There Should Be No Requirement for A New Entrant To Build, Extend, Or Fund An Institutional Network.....	39

E.	PEG Obligations For New Entrants Should Be Comparable To Those Of The Incumbent Cable Operator.	40
F.	The Revenues That Should Be Included In Determining The Applicable Franchise Fee To Be Paid by a New Entrant to an LFA Should Be Defined With Specificity.	41
G.	All State Or Local Level Playing Requirements Should Be Preempted To The Extent They Impose Obligations Beyond Those Required By Federal Law.	43
H.	There Should Be No LFA-Imposed Requirement to Obtain A Franchise Before A Broadband Video Provider Begins Network Enhancements To Provide Cable Service.	45
IV.	THE FCC HAS THE LEGAL AUTHORITY TO INTERPRET SECTION 621(A)(1) OF THE ACT.	47
A.	Congress Delegated Sweeping Authority To The Commission To Fill Gaps In The Communications Act.	48
B.	Congress Specifically Granted The Commission Authority To Interpret and Implement the Cable Act.	52
C.	Courts Have Upheld the Commission’s Interpretation Of The Communications Act Under Similar Circumstances	58
D.	The Commission’s Authority Under Other Provisions of the Communications Act Complements Its Authority Under Title VI.	59
1.	Section 706 Requires The Commission To Encourage Deployment Of Advanced Telecommunications Services.	60
2.	The Commission’s Authority Must Be Construed Liberally.	62
E.	The Commission’s Interpretation Of Section 621 Is Preemptive.	63
1.	Section 636(c) Of The Cable Act Expressly Preempts State And Local Laws Inconsistent With Section 621.	64
2.	State And Local Laws That Impede Competitive Entry Into The Cable Market Conflict With And Frustrate The Objectives Of Congress.	65
V.	CONCLUSION.	68

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of Section 621(a)(1))	
of the Cable Communications Policy)	MB Docket No. 05-311
Act of 1984, as amended by the Cable)	
Television Consumer Protection and)	
Competition Act of 1992)	
)	

**COMMENTS OF BELL SOUTH CORPORATION
AND BELL SOUTH ENTERTAINMENT, LLC**

BellSouth Corporation and its affiliated multichannel video programming distributor (“MVPD”), BellSouth Entertainment, LLC (“BEI”) (hereinafter referred to collectively as “BellSouth”), hereby submit their Comments in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

As the Commission recognized in its *Notice of Proposed Rulemaking*,¹ this proceeding is critical to the achievement of two important and related policy objectives – increased competition in the video market and accelerated broadband deployment.² As Congress made clear in amending the Cable Act in 1992, consumers benefit from increased competition between video providers.³ Similarly, in enacting section 706 of the Telecommunications Act of 1996

¹ *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, *Notice of Proposed Rulemaking*, FCC 05-189 (rel. Nov. 18, 2005) (“*Notice of Proposed Rulemaking*”).

² *Id.* ¶ 1.

³ *See* 47 U.S.C. § 548(a) (“The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market ...”); S. Rep. No. 102-92, 14 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1146 (eliminating the ability of state and local governments to award exclusive franchises and unreasonably refusing additional competitive franchises, noting the “benefits from competition

(“1996 Act”), Congress acknowledged the benefits that the deployment of “advanced telecommunications capability” would bring; namely, the ability of consumers “in all parts of the United States to send and receive information in all its forms – voice, data, graphics, and *video* – over a high-speed switched, interactive, broadband transmission capability.”⁴ Consequently, Congress directed the Commission to take appropriate regulatory measures to “encourage” broadband deployment and to “remove barriers to infrastructure investment.”⁵

The most significant barrier to increased video competition and accelerated broadband deployment is the local cable franchising process. Even under the best of circumstances, the local franchising process is costly and time consuming; of the 20 cable franchises that BEI has secured to date, it took an average of 10 months to negotiate each franchise agreement. If it were to offer a competing cable service throughout its nine-state region, BellSouth would have to secure more than one thousand individual cable franchises. Furthermore, BellSouth would have to do so in an environment when local franchising authorities (“LFA”) enjoy the latitude to impose almost any condition on the grant of a franchise, and these LFA-imposed conditions run the gamut from the reasonable to the harsh and burdensome. A would-be competitor can either choose to accept such conditions as the price of market entry or elect simply not to compete.

between two cable systems”); *see also* *Notice of Proposed Rulemaking*, ¶ 1, quoting *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 04-277, *Eleventh Annual Report*, 20 FCC Rcd 2755, 2757, ¶ 4 (2005) (“*Eleventh Video Competition Report*”) (noting that “[i]ncreased competition can be expected to lead to lower prices and more choices for consumers”).

⁴ 47 U.S.C. § 157 nt; S. Rep. No. 104-23, at 50-51 (1995) (emphasis added).

⁵ 47 U.S.C. § 157 nt.

The impact of the local cable franchising process is best reflected in the current state of competition in the video market. More than twenty years after passage of the Cable Act, cable operators continue to control approximately 70% of the MVPD market.⁶ To be sure, DBS providers such as DirecTV and EchoStar have made competitive inroads, but they have done so without being burdened by the local franchising process (and without being subject to “must build” obligations, franchise fees, service performance requirements, or other local cable franchise obligations). What competition that does exist in the video market today would likely not exist at all if DBS providers were required to obtain a local franchise before entering the video market.

Furthermore, despite the presence of DBS providers, the price of cable service continues to rise. Increases in cable rates have gone nearly unchecked and routinely exceed the rate of inflation,⁷ and incumbent cable operators recently announced yet another round of rate increases

⁶ *Eleventh Video Competition Report*, 20 FCC Rcd at 2869, App. B, Table B-1 (rel. Feb. 4, 2005) (“*Eleventh Video Competition Report*”) (reporting that as of June 2004, cable incumbents controlled 71.62% of the video distribution programming market); *see also* News Release, *FCC Issues 12th Annual Report to Congress On Video Competition*, at 3 (Feb. 10, 2006) (noting that “[a]s of June 2005, the [Commission’s] traditional measure indicates that 69.4 percent of MVPD subscribers received video programming from a franchised cable operator, as compared to 71.6 percent as of June 2004”).

⁷ *Eleventh Video Competition Report*, 20 FCC Rcd at 2772-73, ¶¶ 26-27 (noting cable rate increases in 2003 of 5.6% compared to 1.1 increase in the Consumer Price Index over the same period); *see also Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, MB Docket No. 05-255, *Notice of Inquiry*, 20 FCC Rcd 14117, 14120, ¶ 7 (2005) (“*Notice of Inquiry*”) (noting that the average monthly cable rate paid by subscribers increased by 7.4% in 2004, compared with a 2.1% change in the Consumer Price Index during the same period).

for 2006.⁸ This competitive situation is unlikely to change without competing video offerings from wireline providers – offerings that will not soon be available on a widespread basis under the current local franchising regime.

BellSouth has experienced firsthand the pitfalls of the local franchising process and is looking for a more economical means to compete against incumbent cable operators. Currently, BellSouth is investigating the feasibility of offering video services utilizing a network that also provides broadband and other communications services. BellSouth would be able to offer such a competing video service by enhancing its existing broadband network – a network that already occupies the public right-of-way.

In the context of telecommunications carriers like BellSouth seeking to provide video services over their broadband networks, the LFAs perform functions that are increasingly no longer necessary. When the franchising process first developed decades ago, cable services were offered by monopoly providers utilizing standalone cable systems that were being built from the ground up. The traditional role of LFAs was primarily to administer access to the public right-

⁸ See, e.g., Deborah Yao, “Major Cable Companies Raising Rates,” *The Associated Press*, (Dec. 2, 2005) (“Industry leader Comcast Corp. is raising the rate on its most popular cable package by an average of 6 percent next year in all markets”); Kim Leonard, “Comcast To Raise Bills By 9 Percent In Some Regions,” *Pittsburgh Tribune Review* (Dec. 1, 2005) (“Comcast cable TV subscribers are about to watch their bills soar by as much as 9 percent in some regions around Pittsburgh”); Sanford Nowlin, “Cable Rates Rise Across The Country,” *San Antonio Express-News* (Dec. 3, 2005) (Time Warner “has asked customers nationwide to pay an average 3.1 percent more for its expanded basic package”); Michael Levensohn, “Time Warner Raises Cable Rates In Middletown, N.Y., Area,” *The [Middletown, NY] Times Herald-Record*, (Dec. 8, 2005) (Time Warner Cable customers in New York “will pay about 6 percent more for basic service starting next month”).

of-way, in light of the economic and practical limitations upon the number of cable systems that could be constructed in any given community.⁹

By contrast, as explained below, prospective new entrants such as BellSouth do not seek to compete in the video market on a broad scale by building and operating a standalone cable system; rather they seek to offer a competing video service by enhancing their existing broadband networks. The underlying broadband facilities that new entrant telecommunications carrier video providers (“broadband video providers”) such as BellSouth would use to provide video service are already in place in the public rights-of-way. Thus, the traditional justification for a cable franchise – that it allows the LFA to determine which cable operator should be permitted to use the public rights-of-way – simply does not apply. Furthermore, the fact that broadband video providers would utilize regional or national broadband networks to provide a competing video service further undermines the need for intrusive oversight by LFAs. If LFAs continue to impose the same restrictions and obligations on regional and national broadband network providers as were placed on the incumbent cable operator, these networks would be balkanized and infrastructure investment would suffer.

Consistent with the Commission’s role as the administrator of the Communications Act of 1934, as amended (“Act”) and pursuant to its authority to promote broadband deployment and investment, the Commission should use this proceeding to establish a unified, national framework for the cable market. The Commission should do so by adopting rules to implement

⁹ See *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1558, n.2 (D.C. Cir. 1987) (noting the traditional justifications for local regulation of cable television “has been the fact that cable companies must tear up city streets or string cable along utility poles in order to provide cable service” and “[t]he existence of physical and economic limitations on the number of cable systems that can be constructed and operated in a single community”).

section 621, which is entitled “general franchising requirements” and which outlines when a franchise to provide cable service is required and establishes limits on the obligations that local franchising authorities may impose on cable operators.¹⁰ Section 621(a) prohibits a local franchising authority from “unreasonably refus[ing] to award an additional competitive franchise,” and this Commission not only has the authority, but also the duty to interpret what constitutes an “unreasabl[e] refus[al]” under section 621 to ensure that Congress’s goals of increased video competition and expanded broadband deployment are not thwarted.

In particular, as explained in detail below, the Commission should adopt eight rules interpreting section 621 that would increase video competition and promote broadband deployment. First, the Commission should prohibit a local franchising authority from imposing mandatory build out obligations as a precondition to a broadband video provider’s obtaining a cable franchise. There is no build out requirement in the Cable Act, and requiring mandatory build out on a third or fourth entrant into the market would only deter competitive entry and create a “barrier to infrastructure investment.” Notwithstanding claims to the contrary, a must build obligation as a precondition to an award of a cable franchise is not necessary to ensure that the cable operator does not engage in “redlining” – a practice in which BellSouth has not engaged and will not engage. Redlining can effectively be dealt with on a more targeted basis

¹⁰ See 47 U.S.C. § 541. At bottom, the local franchising process has outlived its usefulness (at least when applied to new entrant telecommunications carrier video providers), and this process should be legislatively revamped. In fact, legislation has been introduced in Congress that would promote video competition by eliminating any franchise obligation on the part of a new entrant that already has access to the public rights-of-way. See, e.g., S. 1349, 109th Cong., “Video Choice Act of 2005” (introduced in the Senate June 30, 2005); H.R. 3146, 109th Cong., “Video Choice Act of 2005” (introduced in the House June 30, 2005). However, the market will not stand still and await legislative reform, particularly when increased broadband investment hangs in the balance, which underscores the critical nature of this proceeding.

when and if a cable operator is found to have denied service “to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.”¹¹

Second, the Commission should require that a local franchising authority rule upon any cable franchise application by a broadband video provider within ninety (90) days, or otherwise the application is deemed granted. Unduly prolonging the decision whether to grant a cable franchise application effectively amounts to an unreasonable refusal to award that franchise when the applicant is a telecommunications carrier that already has network facilities in the public rights-of-way which will be used to provide a competing video service.

Third, the Commission should prohibit any LFA-assessed fees (or in-kind requirements) beyond those expressly authorized by the Act. The local franchising process should not be the regulatory equivalent of a “Christmas wish list” by which local franchising authorities can exact payments or demand free or discounted goods and services wholly unrelated to the provision of cable service. Doing so constitutes an “unreasabl[e] refus[al]” under section 621 because a would-be competitor must either refuse to accede to such demands, in which case the competitor cannot enter the market, or choose to accept such conditions as the price of market entry, in which case the financial calculus for competing successfully is changed dramatically. In either case, video competition and broadband deployment are undermined.

Fourth, the Commission should prohibit a local franchising authority from requiring a broadband video provider to dedicate capacity on any “institutional network” for the benefit of

¹¹ See 47 U.S.C. § 541(a)(3).

the municipality if an institutional network already exists.¹² Local franchising authorities do not need capacity on a duplicate institutional network, and demands that new entrants provide such capacity as a condition to obtaining a cable franchise are unreasonable and unnecessary.

Fifth, consistent with sections 611, 621, and 622 of the Act, the Commission should limit demands for support of “public, educational and governmental” (“PEG”) channels by a new entrant to a reasonable contribution to any capital costs for “adequate” PEG facilities as well an agreement to carry a reasonable number of PEG channels. Demands for support beyond those limits should be prohibited because they exceed the requirements of the Cable Act and amount to an “unreasabl[e] refus[al]” under section 621.

Sixth, the Commission should define with specificity the revenues that should be included in determining the applicable franchise fee to be paid by a new entrant telecommunications carrier video provider to an LFA. Section 622(b) limits the amount of any cable franchise fee to “5 percent of such cable operator’s gross revenues derived ... from the operation of the cable system to provide cable services.”¹³ With rapid changes in technology and the use of a multi-purpose broadband network to provide numerous services, including video, determining how this fee should be calculated is becoming increasingly difficult, and the Commission can and should provide guidance in making this determination. The Commission’s

¹² 47 U.S.C. §§ 541(b)(3)(D) & 531(b).

¹³ 47 U.S.C. § 542(b).

policy has been to resolve franchise fee questions that bear directly on a national policy concerning communications and that require its expertise, and such is the case here.¹⁴

Seventh, the Commission should preempt “level playing field” requirements that go beyond the obligations set forth in the Cable Act because such requirements – whether embodied in a state statute or regulation or a local ordinance – are an impediment to competitive entry and a barrier to infrastructure investment. Although often justified as a matter of “fairness,” requirements imposed under the guise of a “level playing field” routinely exceed federal limits and impose unreasonable costs on a new entrant into the video market. Such requirements are contrary to section 621 and should be prohibited.

Eighth, the Commission should clarify that LFAs have no authority to require a telecommunications carrier to obtain a cable franchise as a condition to or before the carrier enhances its broadband network in order to provide video service. A cable franchise is only required in order for a “cable operator” to “provide cable service.”¹⁵ Contrary to the demands of some municipalities, a cable franchise is not required before a telecommunications carrier installs fiber, upgrades electronics, or takes any other action short of providing cable service. The Commission should make this clear so as not to delay broadband network enhancements or infrastructure investment.

¹⁴ *Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, MM Docket No. 84-1296, *Memorandum Opinion and Order*, 104 FCC 2d 386, 393, ¶¶ 18-19 (1986), *aff'd on this point sub nom.*, *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1573-75 (D.C. Cir. 1987); *see also Time Warner Entertainment/Advance-Newhouse Partnership and the City of Orlando, Florida, Petitions for Declaratory Ruling on Franchise Fee Issues*, 5126-R & 5148-R, *Memorandum Opinion and Order*, 14 FCC Rcd 7678 (1999).

¹⁵ 47 U.S.C. § 541(b)(1).

The rules that BellSouth is proposing would not solve the underlying problem with the local franchising process – the need for a new entrant to get permission from thousands of local municipalities before providing a competing video service. However, by adopting these rules, the Commission would do much to streamline the local franchise process and thereby promote video competition and broadband deployment. The Commission’s adoption of such rules would not only be consistent with but is compelled by Section 621 and the Commission’s authority under the Act.

II. THE CURRENT FRANCHISING PROCESS IMPEDES VIDEO COMPETITION AND BROADBAND DEPLOYMENT

A. BellSouth’s Experiences in Obtaining Traditional Cable Franchises Underscore the Problems with the Local Franchising Process.

The local cable franchising process is administratively cumbersome, slow, costly, and fraught with numerous local political perils and litigation risks. This is true even under the best of circumstances and with the most well-intentioned LFAs, as BellSouth has learned firsthand.

BellSouth has been in the multichannel video programming distribution market for years, and its efforts to compete against incumbent cable operators are especially instructive. BellSouth currently holds 20 franchises to provide cable “overbuild” service in local markets throughout its telephone service area, representing approximately 1.4 million potential cable households. BellSouth provides cable overbuild service to approximately 40,000 customers in the following 14 markets: City of Vestavia Hills, Alabama; City of Chamblee, Cherokee County, Cobb County, DeKalb County, City of Duluth, Gwinnett County, City of Lawrenceville, City of

Roswell, and City of Woodstock, Georgia; and St. Johns County, Miami-Dade County, City of Pembroke Pines and Town of Davie, Florida.¹⁶

For the 20 cable franchises it has negotiated to date, the average length of time required to negotiate each franchise was approximately 10 months. In other words, it took BellSouth nearly one year, on average, to obtain a local cable franchise, and in one case, the franchise negotiation process took almost three years to conclude.¹⁷

BellSouth does not know the exact numbers of LFAs in its region. However, an LFA is typically either a municipality or a county. In BellSouth's region, there are 1055 cities and 499 counties. Thus, assuming each city functions as an LFA and each county performs the same function for unincorporated areas within its boundaries, providing competitive video services throughout BellSouth's region could require obtaining more than 1,500 franchises. Even assuming the quickest and least burdensome application process possible, having to endure this process 1500 times constitutes a staggering impediment to competitive entry.

Moreover, the process is often neither quick nor simple. Currently, LFAs exercise a great deal of latitude in the requirements they impose. The requirements BellSouth has encountered in the franchising process have ranged from reasonable to so onerous as to be insurmountable. In these latter instances, the exceedingly harsh requirements (such as requirements for extensive

¹⁶ In addition, BellSouth has a strategic marketing alliance with DirecTV, Inc. to offer DirecTV digital satellite television service to BellSouth residential customers. As a result of this alliance, over 400,000 BellSouth customers have added DirecTV service to their communication packages.

¹⁷ Declaration of Thompson (Tom) T. Rawls II, ¶¶ 3-4, Exhibit A (hereinafter referred to as "Rawls Declaration").

overbuilding) have been so burdensome that BellSouth was left with no reasonable alternative but to withdraw its application for a cable franchise.

Although the full range of BellSouth's experiences provides useful information, it is especially instructive to consider the following five examples of how the local franchising process actually "works." These examples underscore the extent to which the local franchising process can constitute an impediment to competitive entry in the video market, and they demonstrate how truly untenable the results of unfettered LFA actions can and have become.

1. Miami-Dade County, Florida

In the summer of 1996, BEI filed an application for local franchise authority to provide cable services in the Miami-Dade County area. Miami-Dade County is the single largest local franchising authority in the state of Florida by total population (in excess of 2 million people) and households (just under 1 million). At the time of BEI's application, there were 7 incumbent cable operators serving the Miami-Dade County area, none of which competed against each other in any material way.

Four of the incumbent cable operators filed extensive written objections to BEI's franchise application, including raising various objections under the state's "level playing field" statute. After several months of negotiations with representatives of Miami-Dade County, BEI filed extensive amendments to its franchise application and sought an amendment to the local cable ordinance that would eliminate the 5-year build out requirement and allow any cable operator, including all seven of the incumbent operators, to enter the service territory of any other cable operator in the local franchising authority's jurisdiction to provide a competitive cable service without a build out requirement. Nine months after filing its application, Miami-

Dade County adopted the amendment, eliminating the build out requirement and granting BEI a cable franchise over the strenuous legal and business objections of the incumbent cable operators.

The objections of the incumbent operators were too numerous to list here, but they centered primarily on claims that, (1) removal of the build out requirement violated Florida's "level playing field" statute; (2) without a mandatory build out requirement, BEI would engage in "cherry picking" and "red-lining" (notwithstanding BellSouth's agreement not to engage in red-lining); and (3) the local franchising authority should not grant BEI's franchise until it conducted a comprehensive study to determine whether having BellSouth construct video capable facilities in the public rights-of-way would be adverse to the public interest and endanger the public safety and convenience by placing too great of a burden on public rights-of-way and utility poles.

Efforts by incumbent operators to oppose BellSouth's entry into the video market in Miami-Dade County did not end with the grant of the cable franchise. After BEI's cable franchise was approved on April 15, 1997, the seven incumbent cable operators filed suit against Miami-Dade County in both state and federal court seeking a declaratory ruling that the grant violated the local cable ordinance and state law and seeking injunctive relief blocking BEI from providing service. BEI was joined as a party defendant in both actions.

After nine months and substantial attorney fees, the state court entered summary judgment in favor of Miami-Dade County and BEI. The following month, the United States District Court for the Southern District of Florida dismissed the federal action on grounds that the final state court action constituted *res judicata* of plaintiffs' claims, basically concluding that

the defendants had been sued in two separate lawsuits for the same claims and that they only had to win once. Not surprisingly, the incumbent cable operators appealed both decisions, and equally unsurprising, both decisions were affirmed on appeal.¹⁸

2. DeKalb County, Georgia

On June 24, 1996, BEI filed an application for a local cable franchise to provide cable services in DeKalb County, Georgia. The two incumbent cable operators in DeKalb County – Scripps Howard and MediaOne – opposed BEI’s entry into the market: (1) requesting that the County impose a 5-year build out requirement for BEI’s entire service area; (2) raising concerns about “cherry picking” by BEI; (3) seeking an investigation whether granting BEI a cable franchise would constitute a violation of the federal MMDS cross-ownership restriction set forth in 47 U.S.C. § 533 given that one of BEI’s affiliates (BellSouth Wireless Cable, Inc.) had an MMDS spectrum license covering the same area; and (4) arguing that the County ensure a level playing field and not grant a franchise more favorable or less burdensome than the incumbents’ franchises. To its credit, the County rejected these objections, and the franchise was granted relatively quickly after 5 months of intensive negotiations with county staff and an outside legal consultant.

However, even when a franchise is granted relatively quickly, the local franchising process has adverse competitive consequences, as the DeKalb County franchise illustrates. BEI found itself in a peculiar situation in DeKalb. BEI had initially planned to conduct a video dial-

¹⁸ Rawls Declaration ¶¶ 14-19; *see ACP Holdings, Inc., v. Metropolitan Dade County*, Case No. 97-10915 (11th Cir. Ct., Fla.) (Feb. 25, 1998); *aff’d*, 740 So. 2d 52 (Fla. 3d Dist. Ct. App. 1999); and U.S. District Court for the Southern District of Florida, Case No. 97-1567-CIV-Graham (July 13, 1998), *aff’d*, 184 F.3d 824 (11th Cir. 1999).

tone service trial in DeKalb County and had already constructed video capable transmission facilities passing approximately 4,000 homes in DeKalb and an additional 3,000 homes in a contiguous portion of the City of Chamblee. Before it was in a position to start the video dial-tone trial, however, the Telecommunications Act of 1996 ("1996 Act") was enacted, allowing BEI to provide video entertainment services under a cable franchise model.

Because BEI had already made the investment and built the facilities which it could not use to provide competitive video entertainment services without a cable franchise, BEI had no choice but to agree to some of the most onerous franchise terms, including:

- ?? a relatively modest but nonetheless mandatory and non-market driven build out requirement to ensure that it would deploy facilities and services to several thousand additional homes that were not in BEI's original video service plan but located in a politically sensitive area deemed necessary to win approval of the franchise;
- ?? an annual per subscriber PEG capital facilities and equipment support payment (ranging from approximately \$4.50 to \$2.50 per subscriber per year) over and above the 5% local cable franchise fee;
- ?? an Institutional Network (I-Net) support payment equal to BEI's pro rata per subscriber share of the incumbent cable operator's cost of providing I-Net facilities to the County, based on a maximum total I-Net cost of \$2,000,000, also in addition to the 5% franchise fee;
- ?? up to 10% of BEI's spare conduit capacity for County use; and
- ?? a laundry list of miscellaneous operational, facility and customer service requirements.

If one adds just the above referenced PEG capital and I-Net payments to the 5% franchise fee obligation, the total fees paid by BEI to the County are substantial. Such fees inarguably undermine a new entrant's ability to compete successfully against incumbent cable operators.¹⁹

3. St. Johns County, Florida

Negotiating the St. Johns County, Florida franchise was a two-step process. The initial cable franchise was granted under the rural exemption to the pre-1996 Telecommunications Act cross-ownership restriction that prohibited telephone companies and their affiliates from providing cable services where they also provided local telephone services. The initial franchise only granted authority to provide cable services within a relatively small area of the county containing a new development called World Golf Village. On December 10, 1996, before the development was completed or service was activated and following enactment of the 1996 Act which removed the cross-ownership restriction, BEI filed an amended application seeking authority to extend its cable franchise authorization to include all of the adjacent area served by the incumbent cable operator, Continental Cablevision ("Continental").

Continental vigorously apposed BEI's franchise application to compete in Continental's service area. Attorneys representing Continental filed a number of written objections to BEI's application. BEI's application also was opposed by Time Warner, the incumbent cable operator serving the City of St. Augustine, Florida, which is also located within St. Johns County. Even though BEI was not seeking authority to provide service in Time Warner's franchise area, Time Warner claimed that granting the franchise would give BellSouth the right to "cherry-pick" and

¹⁹ Rawls Declaration ¶¶ 20-24.

that BEI should be required to meet the same five-year build out and line extension requirements contained in Time Warner's cable franchise.

One year after the application seeking authority to extend the existing franchise service area was filed and after numerous amendments to BEI's application and adoption of extensive amendments to the local cable ordinance, BEI's amended franchise was finally approved.²⁰

4. The City of Germantown, Tennessee

In 1996 BellSouth filed applications for authority to provide cable services in Shelby County, Tennessee (a suburb of Memphis) and in the two largest cities located within the Shelby County boundaries – Bartlett and Germantown. BellSouth was able to obtain a cable franchise to serve the City of Bartlett in only 3.5 months. However, after 5 months of negotiating with officials and the consultant firm representing Germantown, BellSouth reached an impasse with Germantown officials, who insisted that BellSouth agree to overbuild all of Germantown and the geographic area served by the incumbent operator in 5 years. Time Warner, the incumbent cable operator, persuaded Germantown officials that it would be a violation of Tennessee's "level playing field" statute not to impose this build out requirement on BellSouth. Notwithstanding BellSouth's legal arguments to the contrary, the City sided with Time Warner, and BellSouth had no choice but to withdraw its application.

Since Germantown represented a significant percentage of the contiguous land area and population of Shelby County (and constituted an important component of the economics supporting BellSouth's business plan to build a video head-end by which to offer competitive video services in the area) BellSouth subsequently withdrew its Shelby County application and

²⁰ Rawls Declaration ¶¶ 24-27.

never activated the Bartlett franchise. To the best of BellSouth's information and belief, the citizens of those communities are still without a choice of competitive cable service providers.²¹

5. The City of Coral Springs, Florida

In the summer of 1996, BellSouth, acting through its cable affiliate BEI, filed an application for a cable franchise to serve the City of Coral Springs, Florida, a community located in southeastern Florida. The City hired a consultant to assist in the negotiations. After conducting a field investigation of BellSouth's local telephone service affiliate's (BellSouth Telecommunications, Inc. or "BST") construction in the area, the City's consultant issued a report to the City, concluding that "BellSouth is installing a video distribution system which can readily be used as a cable television distribution system simply by feeding the system with the appropriate electronic circuitry."

The City subsequently challenged the legal right of BST to construct communications facilities capable of supporting video broadband services in the public rights-of-way under its state-wide franchise without BellSouth first obtaining a cable franchise. Furthermore, the consultant proposed a number of unreasonable cable franchise requirements that it recommended be imposed on BEI that would result in placing "more burdensome and less favorable" franchise requirements on BellSouth to which the incumbent cable operator is not subject. Given the relatively high cost and economic risk of entering the wireline video marketplace as a second or third entrant, BEI elected to withdraw its City of Coral Springs cable franchise application.²²

²¹ Rawls Declaration ¶¶ 9-11.

²² Rawls Declaration ¶¶ 12-13.

These examples highlight only some of the specific difficulties encountered by BellSouth in the local cable franchising process. By no means are these experiences limited to BellSouth, nor do they represent an exhaustive list of the many political, legal, operational and business hurdles associated with obtaining and operating under local cable franchises.

No matter how well-intentioned a local franchising authority may be the current process is inherently unsuitable to facilitating competitive entry. Under the best of circumstances, the franchising process entails a hurdle that a competitor wishing to enter the video market must jump. While this process never facilitates competition, the degree to which it impedes competition has, in BellSouth's experience, been directly linked to whether the LFA imposes requirements that are inherently onerous, such as build out requirements.

Moreover, even when an LFA has agreed to remove unreasonable requirements, BellSouth has still encountered competitors that utilize litigation over the applicability of the requirement to delay competitive entry by BellSouth for years. For example, as noted above, BellSouth obtained a franchise in Miami-Dade County in approximately nine months. The approval of BellSouth's application was concurrent with the adoption of an amendment to the applicable county ordinance to eliminate the previously existing build out requirement. Nevertheless, a coalition of seven incumbents, none of whom meaningfully competed with one another, was able to delay BellSouth's competitive entry with protracted litigation based on the claim that the removal of the build out requirement violated Florida's "level playing field" law. In due course, the incumbent providers lost both the federal and state cases, and they responded by appealing both. Ultimately, they lost both appeals as well. However, their dilatory actions served its intended purpose, which was to forestall competition for as long as possible using any

means at their disposal. The Commission should act to remove such future opportunities for competitive mischief.

To summarize BellSouth's experiences in the cable market, in four of the five examples above the impediments to BellSouth's obtaining a cable franchise were build out requirements, level playing field statutes, and the requirement that a franchise be obtained before network upgrades to BellSouth's network to provide cable service. The results were two withdrawn applications and two applications granted only after extended delays. In the fifth example BellSouth obtained a franchise without extensive delay, but only after agreeing to make payments and provide "in kind" benefits in excess of the statutorily-mandated ceiling of 5 percent on franchise fees.

B. The Current Local Franchising Process Interferes With BellSouth's Unified Broadband Network That May Be Used To Provide Video As Well As Other Services.

Throughout the more than a century in which BellSouth or its predecessors have provided telecommunications service in the southeast United States, BellSouth's network has continued to evolve. From manual switching of voice services handled from switchboards located in central offices by telephone operators to electromechanical switches to digital switches to packet switches, BellSouth's network has continually adapted with advances in technology. With the evolution of switching technology, BellSouth augmented, replaced, and upgraded its network architecture with fiber optic lines. By installing electronics and placing next-generation remote terminals closer to customer homes, BellSouth used its twisted-pair copper wire facilities and fiber optic lines to provide Digital Subscriber Line ("DSL") service, which allowed customers to enjoy high-speed broadband connections to the Internet.

As the latest stage of the evolution of the network, BellSouth is exploring the feasibility of offering Internet Protocol Video, or IPTV as it is commonly called, over a single integrated broadband network that also would be utilized to provide voice grade service, data transmission, Internet access, and other new and innovative services.²³ IPTV is an exciting new mix of interactive services and technology used to enhance and transform the fundamental nature of television entertainment. Unlike traditional cable service, IPTV uses a mix of advanced Internet technologies and advanced telecommunications capabilities to offer consumers a complete suite of interactive entertainment, data and voice services over a single, unified next generation broadband network. As part of its ongoing next generation broadband network development, BellSouth is actively testing IPTV as a competitive multimedia platform for delivering competitive video services in conjunction with the company's voice and data services.²⁴

BellSouth's potential IPTV offering will include a technically integrated package of broadcast and non-broadcast content, interactive subscriber functionality as well as video on demand.²⁵ The network enhancements that will enable the provision of this service would be

²³ Declaration of Lyle Douglas (Doug) Starcher, Exhibit 3 (hereinafter referred to as "Starcher Declaration").

²⁴ BellSouth is working with Microsoft and multiple network vendors to evaluate IPTV over its next generation broadband network. Technical field trials are currently underway, and a full service IPTV market trial is planned for later this year. While BellSouth is still in the evaluation and testing stages of IPTV, preliminary assessments have been positive for this multimedia broadband service. Although BellSouth has not made any decisions at this time regarding a commercial launch of IPTV, any decision to proceed will depend on the results of continued testing and trials, a full assessment of the business opportunity of IPTV, and getting the right regulatory structure in place.

²⁵ Since IPTV uses an interactive service delivery platform consisting of transmission facilities that are designed specifically to provide two way communications functions and features as a technically integrated part of the service, including many of the video service

part of a comprehensive upgrade to BellSouth's "existing access networks to support a new generation of broadband technologies."²⁶ Once complete, this upgraded broadband network would support all of BellSouth's IP-based services such as Internet access, VoIP, IP gaming, home monitoring, and IPTV (i.e., BellSouth's video service). The network enhancements that are being considered would enable the provision of all these services, not just the IPTV service. Moreover, for each service, the fundamental purpose of the network enhancement would be the same: to expand the bandwidth of the network in order to allow a greater scope of product offerings.

This bandwidth expansion is typically accomplished by adding electronics either in central offices, or in the case of the infrastructure for video services, in BellSouth-owned buildings and facilities other than the central offices. As to the changes to the access network, such as upgrades to fiber feeder facilities and to metro interoffice facilities, the upgrades would enable all of the broad range of advanced services BellSouth will offer. Once the identified upgrades to BellSouth's broadband access network have been made, no further upgrades to the underlying network itself would be required to offer IPTV to BellSouth's customer base (although video specific infrastructure would be required in order to support both broadcast and video on demand services).²⁷

applications, as opposed to transmission facilities designed primarily to provide the one-way transmission of cable service, BellSouth strongly believes that IPTV should not be subject to current Title VI cable laws and regulations. However, because of the lack of regulatory clarity on this issue, BellSouth supports legislation that would provide a more competitive video service environment and consistency across states and municipalities.

²⁶ Starcher Declaration, Exhibit 3, p. 1.

²⁷ Starcher Declaration, p. 3.

Moreover, the upgrades to BellSouth's network to enhance all broadband service availability will be accomplished by adding electronic equipment in BellSouth's central offices; adding equipment to BellSouth-owned structures (remote terminal cabinets, huts, etc.) other than central offices; or adding additional fiber strands placed in the public or private right of way. None of these changes would result in BellSouth's expanding its use of the public right of way beyond the current use. Although there may be instances when additional equipment would need to be added in the public right-of-way, when this occurs, the placement of such equipment would be required for the general upgrade of BellSouth's broadband network, not for any reason specific to video service.²⁸

The fact that BellSouth intends to utilize and enhance its existing broadband network to also offer video services is important because it necessarily follows that any rules or restrictions that an LFA seeks to apply to BellSouth's provision of video services (such as a build out requirement) cannot be separated from and will necessarily have an impact on broadband deployment. For example, assume that BellSouth has in place a broadband network that is capable with slight enhancements to provide competitive video service in a major metropolitan area comprised of multiple LFAs. If the relevant LFAs order (for example) that as a condition to granting the franchise applications, BellSouth must extend its facilities to serve the entire geographic area within the LFAs' jurisdiction, BellSouth would be faced with two untenable options. First, it could abandon its plans to utilize its broadband network to provide video service and build out a separate, stand-alone cable network. Obviously, doing so would make no sense whatsoever from a business perspective. Under this approach, BellSouth (or any rational

²⁸ Starcher Declaration, ¶ 6.

prospective competitor) would be forced by economic realities not to use its own facilities to compete against the incumbent cable operator. This scenario would obviously result in the elimination of a major competitor in the cable market.

Alternatively, BellSouth would have to comply with these various build out requirements by enhancing its network with new capabilities (both where it already has local telecommunications facilities and where it does not) and extending that network, which it uses for all communications services purposes, including advanced broadband services into areas where it has no network facilities, all in accordance with the LFA-mandated requirements rather than free market forces and its best business judgment. However, doing so would also likely not be economically viable, would definitely not be the most efficient and fastest way to deploy services and investment in new broadband facilities, and would also likely result in BellSouth deciding not to compete against the incumbent cable operator in many of its local markets. Moreover, even if BellSouth were to attempt to enhance and extend the existing network to comply with a build out requirement (or a requirement to duplicate an existing institutional network, or any other burdensome condition on which a franchise may be conditioned) then there would be a corresponding negative impact on broadband deployment, which would undermine the President's, Congress's, and this Commission's stated broadband goals.²⁹

²⁹ See Speech of President Bush, March 26, 2004 (available at <http://www.whitehouse.gov/infocus/technology/economic_policy200404/innovation.pdf>) (declaring the need for "universal, affordable access for broadband technology by the year 2007"); 47 U.S.C. § 157(a) nt (directing the Commission to "encourage the deployment . . . of advanced telecommunications capability to all Americans"); *Availability of Advanced Telecommunications Capability in the United States, Fourth Report and Order*, 19 FCC Rcd 20540, 20542, Statement of Commissioner Kevin J. Martin (Sept. 9, 2004) ("Encouraging the deployment of broadband services to all Americans has been my top priority during my tenure at the Commission. Broadband services are essential to the economy of the 21st century . . .").

C. The Current Local Franchising Process Is Irreconcilable With Promoting Broadband Deployment And Undermines The New And Innovative Video Offerings That Rely On Broadband Service.

In its recent *Broadband Internet Access Order*,³⁰ the Commission removed a number of regulatory obstacles that applied to broadband service in order to establish a new regulatory framework for the offering of these services. As the Commission explained:

This framework establishes a minimal regulatory environment for wireline broadband Internet access services to benefit American consumers and promote innovative and efficient communications. First, this Order encourages the ubiquitous availability of broadband to all Americans by, among other things, removing outdated regulations. Those regulations were created over the past three decades under technological and market conditions that differed greatly from those of today.³¹

Further, the Commission noted that “the actions we take in this Order allow facilities-based wireline broadband Internet access service providers to respond to changing marketplace demands effectively and efficiently, spurring them to invest and deploy innovative broadband capabilities that can benefit all Americans, consistent with the Communications Act of 1934.”³²

The *Broadband Internet Access Order* is the Commission’s most recent effort designed to remove outdated regulatory requirements that hinder broadband deployment. Recognizing the importance of encouraging broadband infrastructure deployment and investment, the Commission has eliminated broadband unbundling requirements,³³ granted forbearance from

³⁰ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, CC Docket No. 02-33, *et al.*, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14853 (2005) (“*Broadband Internet Access Order*”).

³¹ *Id.* at 14855, ¶ 1.

³² *Id.*

³³ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al.*, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, 17145, ¶ 278 (2003) (“*Triennial*

section 271 with respect to broadband facilities,³⁴ and preempted state commission attempts to regulate broadband services.³⁵ In doing so, the Commission has recognized that the application of burdensome obligations “to these next-generation network elements would blunt the deployment of advanced telecommunications infrastructure ... in direct opposition to the express statutory goals authorized in section 706.”³⁶

The Commission’s broadband policy is plain. This Commission has: (1) consistently expressed a clear determination to remove regulatory barriers so that competitive factors will drive broadband deployment; and (2) correctly concluded that this approach will facilitate the necessary investment to bring about broadband deployment as rapidly as possible. Inherent in this policy is the recognition that broadband networks will be deployed and infrastructure investments will be made most quickly when competitors are allowed to install broadband facilities in a manner and at a time that is economically efficient and market driven. Any other approach, as the Commission has correctly and consistently concluded, will discourage investment, hinder competition, and delay the availability of broadband services.

Review Order”), vacated in part and remanded, United States Telecom Ass’n v. FCC, 359 F.3d 554 (D.C. Cir.) (“USTA II”), cert. denied 125 S. Ct. 313, 316 (2004).

³⁴ *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), et al.*, WC Docket No. 01-338, *et al.*, *Memorandum Opinion and Order*, 19 FCC Rcd 21496, 21512, ¶ 34 (applying section 706 to new fiber broadband facilities and “next-generation technologies”).

³⁵ *See BellSouth Telecommunications, Inc. Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services By Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, WC Docket No. 03-251, *Memorandum Opinion and Order and Notice of Inquiry*, 20 FCC Rcd 6830 (2005).

³⁶ *Triennial Review Order*, 18 FCC Rcd at 17149, ¶ 288.

All of which begs the question how a national policy to encourage broadband deployment can possibly co-exist with a regime under which LFAs are allowed to micromanage regional and national broadband networks as a prerequisite to allowing them to be utilized for purposes of offering a competing video service. The answer is that it cannot. Allowing an LFA to have unbridled authority to, for example, order build out according to whatever local concerns it deems important is fundamentally incompatible with the national policy of increasing broadband deployment and reduced regulation of broadband networks.

The Commission has eliminated regulation of broadband networks precisely because such regulations were unnecessary in a competitive market and serve only to depress and delay broadband deployment. If LFAs are allowed to impose burdensome and onerous requirements on these same broadband networks, then LFAs will be acting contrary to the policies of this Commission. This is particularly true if such requirements result in any would be competitor abandoning its plans to compete or force the competitor to deploy broadband infrastructure in an uneconomic manner.

In the current MVPD market, video competition from telecommunications carriers such as BellSouth offers the greatest and best hope of introducing a meaningful alternative to the entrenched incumbent cable operator. If LFAs are permitted to delay or prevent broadband providers from also offering video service, then competition will be greatly (and probably permanently) impeded.

This is particularly true given the plethora of new video offerings that require robust broadband networks. For example, Apple Computer recently signed agreements to distribute a number of current and past television shows from broadcast and cable networks through iTunes

for a flat download fee of \$1.99.³⁷ Similarly, in November 2005, America Online and Warner Brothers jointly announced a new broadband network slated to go online in early 2006 that will feature 300 classic television shows accessible through six channels.³⁸ A number of cable networks – such as MTV’s Overdrive and CNN’s Pipeline – are launching their own Internet-based channels available to broadband subscribers.³⁹ Without continued deployment of broadband networks and more vibrant broadband service, these additional video options are unlikely to succeed.

III. THE COMMISSION SHOULD FACILITATE COMPETITION BY ADOPTING EIGHT RULES THAT WOULD STREAMLINE THE LOCAL FRANCHISE PROCESS AND ELIMINATE UNNECESSARY OPPORTUNITIES FOR DELAYING OR PREVENTING COMPETITIVE VIDEO ENTRY

The national policy of promoting broadband and video competition is obviously not served by a process that allows an LFA to impose unreasonable requirements that substantially delay or prevent competitive entry. The imposition of such requirements is tantamount to the “unreasonabl[e] refus[al] to award an additional competitive franchise,” which is expressly prohibited by section 621(a)(1). In other words, there is no practical distinction between unreasonably refusing to grant a franchise application and imposing requirements for the granting of an application so unreasonable that they constitute an insurmountable barrier to entry.

³⁷ *Apple, with Disney's help, Shakes up Video Distribution*, CNET News.com (Oct. 14, 2005) (available at news.com.com/Commentary+Apples+video+jump-start/2030-1041_3-5895461.html).

³⁸ *AOL Says “Welcome back” to Old TV Shows*, CNET News.com (Nov. 30, 2005) (available at http://news.com.com/2100-1026_3-5950149.html).

³⁹ *Prime Time for CNN.com Premium Video?* CNET News.com (Dec. 12, 2005) (available at http://news.com.com/Prime+time+for+CNN.com+premium+video/2100-1026_3-5991219.html); <http://www.mtv.com/overdrive/>.

At first blush, the local franchising process may seem to be purely a local issue. Nevertheless, more than 30 years ago, this Commission recognized the need to intervene in the administration of local cable systems by LFAs when national telecommunications policy was affected. Prior to 1984, the Commission had no express jurisdiction to regulate the cable industry. Nevertheless, the Commission did not hesitate to adopt rules to promote video competition that were “reasonably ancillary to the effective performance of the Commission’s [recognized] responsibilities for the regulation of television broadcasting.”⁴⁰

One example is former 47 C.F.R. Section 76.31 (1983) (now deleted), which “placed a cap on the fees that a franchising authority charged a cable operator for a right to provide cable service.”⁴¹ The rule reflected the Commission’s decision to preempt the LFA’s discretion to set the amount of franchise fees because excessive fees had the potential to damage the growth of the cable industry. Thus, the Commission set a ceiling on fees “to prohibit local franchising authorities from stunting the growth of an increasingly important communications medium through the imposition of excessive fees.”⁴² Similarly, the Commission preempted the ability of LFAs to regulate rules for non-basic cable services because these services “were typically subject to competition from a number of sources, making rate regulation both unnecessary and unwise.”⁴³

⁴⁰ *American Civil Liberties Union*, 823 F.2d at 1558, quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1559.

Although the regulatory landscape has changed substantially during the past 20 years, what has remained constant is the Commission's willingness to preempt local franchising authorities and to adopt rules restricting the LFAs' exercise of discretion when this action was required to preserve federal communications policy. In other words, this Commission has a long history of taking precisely the types of steps to ensure video competition that are required now. Furthermore, with changes in technology and the video market over the past several decades, the appropriate role of LFAs has been diminished, particularly with respect to telecommunications carriers that also seek to provide a competitive video service using their broadband networks. Pursuant to section 621, the Commission should adopt reasonable constraints on the discretion of LFAs in the local franchising process, which are necessary to ensure that Congress's goals in ensuring video competition and promoting broadband deployment are realized.

As stated previously, the local franchising process is inherently a hindrance to competitive entry. However, the burden that this process produces can be eased somewhat by: (1) streamlining the local franchising process; and (2) eliminating unnecessary opportunities for delaying or preventing competitive video entry. Accordingly, BellSouth proposes that the Commission adopt the following eight rules that would accomplish these two objectives.

A. Build Out Requirements Should Be Prohibited As A Precondition To A Broadband Video Provider Obtaining A Cable Franchise.

Importantly, there is no build out requirement in the Cable Act. Although entrenched incumbent cable operators have argued otherwise, citing to either Section 621(a)(3) or 621(a)(4)(A), neither statute imposes a build out obligation.⁴⁴

⁴⁴ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Comments of the National Cable & Telecommunications

Section 621(a)(3) provides that “[i]n awarding a franchise or franchises, the franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.” In *American Civil Liberties Union*,⁴⁵ the United States Court of Appeals for the District of Columbia considered the arguments of a number of incumbent cable operators that the above-quoted language requires a complete build out of all areas within the geographic boundaries of the LFA. The court first observed that the “language [of the statute] goes no further than to require that service not be denied to low income subscribers, a practice known as redlining.”⁴⁶ The court noted that the Commission had initially interpreted this section to “mean that the franchising authority shall require *all* areas of the franchised area be wired,”⁴⁷ but subsequently reversed itself, concluding that,

The intent of [section 621(a)(3)] was to prevent the exclusion of cable service based on income and that this section does not mandate that the franchising authority require the complete wiring of the franchise area in those circumstances where such an exclusion is not based on the income status of the residents of the unwired area.⁴⁸

The petitioning incumbent cable operators argued that the court should reject this interpretation on the basis of language in the legislative history which appeared to indicate that the prohibition against redlining mandated build out throughout the entire franchise. The court,

Association at 20 (filed Sept. 19, 2005); Reply Comments of Comcast Corporation at 21, n.83 (filed Oct. 11, 2005).

⁴⁵ *American Civil Liberties Union v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987).

⁴⁶ *Id.* at 1579.

⁴⁷ *Id.* (emphasis in original).

⁴⁸ *Id.*, quoting *Implementation of the Provisions of the Cable Communications Policy Act of 1984*, MM Docket No. 84-1296, *Report and Order*, 50 Fed. Reg. 18637, 18647 (1985).

however, found that no conflict existed between the language in the legislative history and the Commission's interpretation. In doing so, the court noted:

The statute on its face prohibits discrimination on the basis of income; it manifestly does not require universal service. The agency ruling explicitly reaffirms the prohibition against redlining emphasized by the House Report. ... We hold that this one sentence from the Committee Report cannot reasonably be read to so drastically limit the agency's interpretation of the scope of its discretion in accomplishing the legislative goal. ... Rather, we read the sentence to require exactly what it says: "wiring of all areas of the franchise" to prevent redlining. However, if no redlining is in evidence, it is likewise clear that wiring within the franchise area can be limited. This is precisely the statement made in the interpretative ruling. It wholly conforms to the statute and the explication in the House Report.⁴⁹

Not to be deterred, incumbent cable providers have more recently argued that build out is required by Section 621(a)(4)(A), which states that in awarding a franchise, the franchise authority "shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchised area."⁵⁰ The plain meaning of this language is that the applicant determines the area that it wishes to serve, and the LFA grants the applicant a reasonable amount of time to "build out" to the extent necessary to provide service to this designated area.

Notwithstanding claims to the contrary, this language does not impose a statutory build out requirement.⁵¹ The United States District Court for the District of Columbia recognized as much in *Americable International Inc. v. United States Department of Navy*.⁵² In that case, the

⁴⁹ *Id.* at 1580.

⁵⁰ 47 U.S.C. § 541(a)(4)(A).

⁵¹ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Comments of the National Cable & Telecommunications Association at 20 (filed Sept. 19, 2005).

⁵² *Americable International, Inc. v. U.S. Dept. of Navy*, 931 F. Supp. 1 (D. D.C. 1996).

plaintiff was an incumbent cable operator that held a cable franchise for a naval air station. The Navy, acting as the LFA, granted a franchise to a competitive provider that did not include a build out requirement. On appeal, the incumbent cable operator argued, based on section 621(c)(4)(A), “that the Cable Act establishes a ‘requirement’ that a franchise ‘provide universal service throughout the franchise area.’”⁵³ The court rejected this argument, and noted that the language of Section 621 “on its face contains no ‘requirement’ of ‘universal service,’ of course.”⁵⁴ The court further noted that the incumbent’s “strained argument is at odds with the purpose of the Cable Act, which is to promote competition, and of the amendment in question, which protects the interests of new franchise applicants and not incumbents like [the Plaintiff].”⁵⁵ Clearly then, the Cable Act does not contain any sort of mandatory build out requirement.

To be clear, the debate about whether a new entrant should be subject to a mandatory build out requirement is not about “redlining.” BellSouth has not engaged in redlining in the past and will not do so in the future. If there were actual evidence that BellSouth or any provider was offering cable service in a manner that constituted redlining, the LFA could address this situation by retaining the right in the franchise grant to require upon such showing that those low income customers be served. However, there is absolutely nothing in the Act that makes build out a routine obligation that every new entrant must meet as a precondition to its obtaining a cable franchise, ostensibly as a means to prevent redlining before and regardless of whether it occurs.

⁵³ *Id.* at 2.

⁵⁴ *Id.* at 3.

⁵⁵ *Id.*

Many requirements that may have been reasonable in a former monopoly environment simply cannot be sustained today. Build out is such a requirement. During the many years that technology limited cable offerings by providers utilizing standalone cable systems, cable providers were frequently awarded community-wide monopolies. In this context, a requirement that the provider build out facilities to the entire community made some sense. The essential bargain was that the single franchised cable system would provide service to everyone in a community in exchange for being the only provider from whom anyone in the community might purchase service. Thus, a financial burden was placed upon the monopoly provider in exchange for the undeniable benefit of being able to operate without competition.

Imposing a build out requirement on a new competitor constitutes an impediment to competition because a fundamentally different situation exists today. First, today, because “almost all consumers have the choice between over-the-air broadcast television, a cable service, and at least two DBS providers ...,”⁵⁶ there is no need for a second or third facilities-based provider to build out as well. Further, a competing cable provider that seeks to offer service in a particular community cannot reasonably expect to capture more than a fraction of the total market. Thus, a municipality-wide build out requirement would impose on the competitor a fundamentally inequitable arrangement whereby it would have to incur tremendous construction costs to develop the ability to serve every customer in exchange for capturing some (probably small) percentage of the market. In many instances, this build out requirement would make entry so uneconomic that the prospective competitive provider would simply decline to serve any portion of the community and would withdraw its application.

⁵⁶ *Notice of Proposed Rulemaking*, ¶ 1 (quoting *Eleventh Video Competition Report*, 20 FCC Rcd 2755, 2757 (2005)).

That is precisely what has happened to BellSouth. In Shelby County, Tennessee, and in Coral Springs, Florida, BellSouth withdrew its applications for a cable franchise when it became clear that those applications would be granted only if BellSouth agreed to onerous build out requirements. The end result was that the video market in those two communities lost a viable wireline competitor, and customer choice suffered as a result.

The extent to which a build out requirement creates an unsustainable burden for a new entrant is demonstrated by the fact that incumbent cable operators argue for this requirement so vigorously. Typically, when a new entrant plans to serve only a portion of the potential customers in a community, the incumbent intervenes in the application process and argues that the new entrant should be made to build out its network so that it can serve every customer that the incumbent serves, thus making the new entrant a competitive threat to a greater portion of the incumbent's customers. This seemingly irrational decision by the incumbent cable operator to force the new entrant to develop additional service scope can only be explained by one fact: the incumbent fully realizes the extent to which a build out requirement poses a competitive barrier, which in many instances, the prospective new competitor cannot sustain.

Finally, as discussed previously, when the prospective competitor is already operating a broadband network in the public right-of-way, a build out requirement not only impedes video competition, but it impedes broadband deployment as well. This is particularly true given that BellSouth's broadband network has been built based upon wire centers, the locations of which bear no relationship to an LFA's boundaries. Imposing build out requirements in such a case would only serve to make broadband deployment uneconomic and doom economic infrastructure investments.

B. All Cable Franchise Applications By Broadband Video Providers Should Be Ruled Upon Within 90 Days, Or Otherwise Should Be Deemed Granted.

In the absence of a rule to prescribe the length of time by which cable franchise applications must be addressed, LFAs have unfettered discretion to delay the process for months if not years. In order to foster competition, the Commission must set a reasonable timeframe by which LFAs are required to act on a franchise application from a broadband video provider that already has access to and network facilities in the public rights-of-way. Specifically, the Commission should adopt a rule that cable franchise applications by broadband video providers that are already utilizing the public right-of-way be ruled upon within 90 days, or the application will be deemed granted (unless the parties mutually agree to an extension of time).

In those instances in which BellSouth has waited for months if not years for an LFA to approve its application, the delay has almost always been the result of an LFA imposing (or a competitor arguing for the imposition of) one of the burdensome restrictions that BellSouth has requested herein that the Commission prohibit by rule. Thus, if an LFA need not consider whether to impose a build out obligation (or determine what is required to satisfy a level playing field statute beyond the obligations set forth in the Cable Act), then deciding whether to grant an application becomes a relatively straightforward process that can be accomplished quickly. In Georgia, for example, four of the eight BellSouth franchise applications were approved in two and a half months or less. Moreover, as stated previously, broadband video providers already use the public rights-of-way to provide voice and other communications services. Under such circumstances, a ninety (90) day review period is sufficient for the LFA to decide whether that provider should be awarded a cable franchise.

The 90-day timeframe proposed by BellSouth is consistent with section 617,⁵⁷ which provides that if a franchise requires LFA approval of a sale or transfer, then the LFA must act on any application for sale or transfer in 120 days. If the LFA fails to act within this timeframe, then the application is deemed to be granted, unless the LFA and their requesting party agree to an extension. In other words, Section 617 is structured in precisely the same way as the rule for application approval that BellSouth seeks. The difference between the two provisions would be that section 617 allows 120 days to approve a sale or transfer, while, BellSouth submits, 90 days should be more than adequate time to approve a franchise application by a broadband video provider that is already utilizing the right-of-way.

Before approving a sale or transfer, it may be necessary for the LFA to undertake a review of the qualifications of the purchasing company and to determine whether it has the financial wherewithal to provide services and otherwise undertake the obligations of the transferring operator. The LFA also may need to make inquiries to determine if there is any reason that the transferee company might be unsuitable to hold the franchise. In contrast, when considering an application of a provider such as BellSouth, the due diligence that would be required by the LFA in a transfer situation is completely unnecessary. BellSouth is already utilizing the public rights-of-way and has had a long history of providing telecommunications services to the community. Thus, the time needed to consider any cable application by a broadband video provider such as BellSouth should be extremely short.

⁵⁷ 47 U.S.C. § 537.

C. LFA-Assessed Fees (or In-Kind Requirements) Beyond Those Authorized By The Act Should Be Prohibited.

Section 622 provides that franchise fees must not exceed 5% of the “gross revenues derived in such period from the operation of the cable system to provide cable services.”⁵⁸ Nevertheless, in BellSouth’s experience, LFAs often seek to impose fees on or exact various concessions from applicants seeking to obtain a cable franchise in amounts that exceed the 5% cap. Alternatively, LFAs sometimes require the provision of in-kind benefits to local government that have a value that exceeds this cap. When this occurs, the required fee (or benefit) is generally denominated as something other than a franchise fee.⁵⁹

However, regardless of how a fee or benefit is labeled by the LFA, “franchise fees” are defined to include “any tax, fee, or assessment *of any kind* imposed by a franchising authority or other governmental entity” on a cable operator, including “payments which are required by the franchise to be made by the cable operator ... for, or in support of the use of, public, educational or governmental access facilities.”⁶⁰ The only items specifically excluded from the broad definition of a franchise fee are: (1) taxes, fees and assessments of general applicability, (2) “capital costs” associated with “public, educational, or governmental access facilities,” and (3)

⁵⁸ 47 U.S.C. § 542(b).

⁵⁹ See, e.g., Dionne Searcey, *As Verizon Enters Cable Business, It Faces Local Static*, Wall Street Journal, Oct. 28, 2005, at A1 (noting that in seeking franchises in New York, Verizon faced “requests for seed money for wildflowers and a video hookup for Christmas celebrations”; that Arlington County, Virginia wanted “fiber strung to all its traffic lights so it can remotely monitor traffic flow”; that Holliston, Massachusetts sought “free television for every house of worship and a 10% video discount for all senior citizens”: and that other cities have asked for “high-speed Internet for sewage facilities and junk yards, flower baskets for light poles, cameras mounted on stop lights, and Internet connections for poor elementary students”).

⁶⁰ 47 U.S.C. §§ 542(g)(1) & (2)(B) (emphasis added).

“incidental” charges such as “bonds, security funds, letters of credit, insurance, indemnification, penalties or liquidated damages.”⁶¹ With the exception of those items specifically excluded from the franchise fee definition, the Commission should prohibit any fee, obligation, or in-kind assessment imposed by an LFA in excess of the statutory cap.⁶²

D. There Should Be No Requirement for A New Entrant To Build, Extend, Or Fund An Institutional Network.

The Cable Act provides that the LFA “may establish requirements in a franchise with respect to the designation or use of channel capacity for [PEG] use *only to the extent provided in this section.*”⁶³ It further provides that an LFA may require in a cable franchise “that channel capacity be designated for [PEG] use, *and channel capacity on institutional networks be designated for educational or governmental use.*”⁶⁴ However, in some cases, LFAs have misread this language by seeking to place upon competitive cable providers burdensome requirements to build, extend or fund institutional networks (“I-Net”) for local government use, even though the Cable Act does not authorize an LFA to do so.⁶⁵

⁶¹ 47 U.S.C. § 542(g)(2).

⁶² See, e.g., *United Artists Cable of Baltimore*, 11 FCC Rcd 18158, ¶ 17 (1996) (noting Congress’s “strong desire to prevent attempts by local franchising authorities to evade the statutory five percent cap on franchise fees”; Cong. Rec. S8254 (daily ed. June 13, 1983) (statement of Sen. Barry Goldwater) (noting that “the overriding purpose of the five percent fee cap was to prevent local governments from taxing private operators to death”).

⁶³ 47 U.S.C. § 531(a) (emphasis added).

⁶⁴ 47 U.S.C. § 531(b) (emphasis added).

⁶⁵ See *City of Dallas v. FCC*, 165 F.3d 341, 350 (5th Cir. 1999) (holding that section 611 “does not permit localities to require cable operators to build institutional networks, but instead, by its terms, merely states that” an LFA may require channel capacity on an existing I-Net).

Section 611 of the Cable Act authorizes the designation of channel capacity on an existing “institutional network,” which is defined as “a communications network which is constructed or operated by the cable operator and which is generally available only to subscribers who are not residential subscribers.”⁶⁶ It does not authorize the construction, extension, or funding of any networks or facilities, and imposing such a burden would be detrimental to competition, particularly when an I-Net already exists. As the Commission has previously recognized in the context of Open Video Systems, it is both “unnecessary” and “wasteful” to require a new entrant to construct duplicate facilities, and requiring the construction of such duplicative facilities would undermine “Congress’ goal of competitive entry.”⁶⁷ Accordingly, the Commission should find that any demand by an LFA that a new entrant construct, extend, or fund an I-Net as a condition to obtaining a cable franchise is an unreasonable refusal to award a franchise under section 621(a).

E. PEG Obligations For New Entrants Should Be Comparable To Those Of The Incumbent Cable Operator.

The Cable Act plainly authorizes the LFAs to require a cable provider to supply local government with capacity for PEG access channels for noncommercial programming. Although BellSouth has no objection to these requirements, they should be applied in a way that is competitively neutral.

⁶⁶ 47 U.S.C. § 531(f).

⁶⁷ *Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems*, CS Docket No. 96-46, *Third Report and Order and Second Order on Reconsideration*, 11 FCC Rcd. 20227, 20283-84, ¶¶ 131, 132 (1996).

In a monopoly environment, the entire cost of providing PEG capacity would, of course, be born by the monopolist. Although the Cable Act does not provide any indication of how these costs should be apportioned among carriers in a competitive environment, the Commission should ensure that the PEG obligations imposed on new entrants are no greater than those imposed upon the incumbent cable operator. In addition, the Commission should direct that PEG obligations of new entrants take into consideration the substantially smaller cable subscriber base of a new entrant upon which it ultimately must rely to recover its cost as compared to the incumbent cable operator.

F. The Revenues That Should Be Included In Determining The Applicable Franchise Fee To Be Paid by a New Entrant to an LFA Should Be Defined With Specificity.

With municipalities under increasing financial pressures, they often look to the cable franchise fee as an important revenue stream.⁶⁸ However, beyond expecting payment of a franchise fee on “gross revenues derived in such period from the operation of the cable system to provide cable services,”⁶⁹ LFAs are increasingly looking to other services offered by cable operators upon which to assess a franchise fee.

The types of service revenues upon which LFAs are seeking to collect a franchise fee are bounded by little more than the LFA’s imagination. For example, in renewing Time Warner’s cable franchise, the City of Lincoln Nebraska sought to define “gross revenues” broadly for

⁶⁸ See, e.g., Haugsted, Linda, “Cities: Auditing For Dollars Makes Sense; Cash-Strapped Governments Are Checking Things Twice, Seeing What’s Due Them And Demanding Cash,” *Multichannel News*, at 40 (Apr. 26, 2004) (noting a “heightened interest” by local governments in auditing the payment of franchise fees by cable operators because “local governments are increasingly cash-starved”).

⁶⁹ 47 U.S.C. § 542(b).

purposes of computing its franchise fees, required a \$15,000 application fee, and required a grant fee equal to the City's direct costs in the franchising process less the amount of the application fee.⁷⁰ More recently, the City of Minneapolis sued Time Warner seeking to collect franchise fees for revenues associated with cable modem service.⁷¹

The problem of determining which revenues are appropriately derived "from the operation of the cable system to provide cable services" and for which a franchise fee should be paid is particularly problematic in the context of video provided over a converged broadband network. For example, revenues associated with the transmission of "interactive on-demand services" within the definition of 47 U.S.C. § 522(12) (including video programming services not prescheduled by the programming provider) should not be included in the franchise fee. Likewise, the franchise fee should exclude revenues from the transmission of video programming services provided by a nonaffiliated retail provider that is delivered over a telecommunications carrier's broadband network for the reason that such third party providers do not need a cable franchise even to provide prescheduled video programming services because they do not have a sufficient ownership interest in or control of the network facilities to qualify as a cable operator within the meaning of 47 U.S.C. § 522(5).⁷² Similarly, revenues from the transmission of video programming by a nonaffiliated retail provider that is using only a

⁷⁰ *Time Warner Entertainment-Advance/Newhouse Partnership v. City of Lincoln*, 360 F. Supp. 2d 1012 (D. Neb. 2005).

⁷¹ *City of Minneapolis v. Time Warner Cable, Inc.*, No. Civ. 05-994 ADM/AJB, 2005 U.S. Dist. LEXIS 27743 (D. Minn. Nov. 10, 2005).

⁷² Under federal law, only cable operators are required to obtain a cable franchise before providing cable service. 47 U.S.C. § 541(b).

telecommunications carrier's common carrier transmission facilities in the public rights-of-way would be excluded from a franchise fee pursuant to 47 U.S.C § 522(7)(C).

Furthermore, drawing the line between video services will only get even more complicated as available video options continue to proliferate. For example, how should an integrated video service that includes voice and other "non-cable" services be treated for cable franchise fee purposes? To what extent should broadband revenues be included in the franchise fee calculation when used to provide video service? These are critical issues that require the Commission's expertise to resolve, rather than a LFA, which has an obvious vested interest in the outcome. While the Commission generally will not assert jurisdiction over franchise fee disputes that concern matters of local taxation, the Commission's policy has been to resolve franchise fee questions that bear directly on a national policy concerning communications and that require its expertise.⁷³ That is the case here.

G. All State Or Local Level Playing Field Requirements Should Be Preempted To The Extent They Impose Obligations Beyond Those Required By Federal Law.

Two states in BellSouth's region – Florida and Tennessee – have adopted at the behest of incumbent cable operators so-called "level playing field" statutes.⁷⁴ In a nut shell, "level playing field" statutes prohibit local governments from granting a cable franchise to a competitive cable

⁷³ *Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, MM Docket No. 84-1296, Memorandum Opinion and Order, 104 FCC 2d 386, 393, ¶¶ 18-19 (1986), *aff'd on this point sub nom.*, *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1573-75 (D.C. Cir. 1987); *see also Time Warner Entertainment/Advance-Newhouse Partnership and the City of Orlando. Florida, Petitions for Declaratory Ruling on Franchise Fee Issues*, 5126-R & 5148-R, *Memorandum Opinion and Order*, 14 FCC Rcd 7678 (1999).

⁷⁴ Fla. Stat. § 166.046; Tenn. Code Ann. § 7-59-203.

service provider that “is more favorable or less burdensome” than the incumbent’s cable franchise. Although undoubtedly well intended from the state legislator’s point of view, these statutes frequently operate or are used by the incumbent cable operator, as highlighted below, as intentional barriers to competitive entry. Significantly, and not by accident considering their source, these statutes protect only incumbent cable operators and typically do not prohibit local franchising authorities from imposing conditions on new video competitors that are “more burdensome or less favorable” than the incumbent’s franchise.⁷⁵

Absent preemption, LFAs have sought to apply these level playing field statutes in a way that places a nearly insurmountable hurdle in the path of a would-be competitor. Moreover, the mere existence of these statutes provides a basis (albeit not a legitimate basis) for endless litigation by incumbent cable operators seeking to forestall competition. BellSouth’s above-noted experience in Miami-Dade County provides a good example of the mischief incumbents can create by relying upon “level playing field” statutes. In that case, the LFA made the reasonable decision to repeal the local ordinance that required build out. A combination of seven incumbents responded by arguing in protracted litigation that the LFA was barred from doing so by Florida’s level playing field statute. Ultimately, the incumbents lost this legal battle, but by waging the battle, they significantly delayed BellSouth’s entry into the market. Thus, even when

⁷⁵ Rawls Declaration ¶ 6. In addition to “level playing field” statutes, many cable operators have succeeded during franchise renewal proceedings in persuading local franchising authorities to adopt “level playing field” cable ordinances that accomplish the same result. Interestingly, the average time required for BellSouth to negotiate a cable franchise in Florida, a “level playing field” statute state, was approximately 12 months, as compared with approximately 7 months that it took BellSouth to obtain a cable franchise in Georgia, a non-level playing field statute state. *Id.*, ¶¶ 4 & 7.

level playing field statutes are not harshly applied by LFAs, they are abused by litigious incumbents.

Finally, it must be noted that any purpose that was once served by level playing field statutes no longer pertains in the current competitive environment. Again, the conditions to franchise approval that were placed long ago on incumbents were imposed when they were monopoly service providers who were granted the exclusive right to provide cable service in the local community. When a competitor enters the cable market now, the bargain is fundamentally different. A new entrant can expect to obtain, at best, a share of the market, and thus cannot afford to make the sort of investment required of monopoly cable services providers in this past. The competitive market should determine when and where new entrants offer service. If LFAs ignore this principle and impose on new entrants the same requirements as those previously imposed on incumbents prior to the competitive era, then the result will not be in any meaningful sense a level playing field. Instead, the result will be to place an unsustainable burden on competitive providers and to hamper competition by doing so. Accordingly, the Commission should preempt any state or local statute, ordinance, or rule that, under the guise of ensuring a “level playing field,” imposes obligations on a new entrant beyond the requirements of federal law.

H. There Should Be No LFA-Imposed Requirement to Obtain A Franchise Before A Broadband Video Provider Begins Network Enhancements To Provide Cable Service.

As noted above, BellSouth has experienced a situation when an LFA took the position that BellSouth should not be allowed to make any additions or enhancement to its network for the purpose of providing cable service until after a franchise to provide cable service was

obtained. Likewise, in an earlier case involving BellSouth, two trade associations of (mostly incumbent) cable operators claimed “that BellSouth violated the [Cable] Act by constructing cable systems before obtaining cable franchises.”⁷⁶ This Commission, while resolving the matter on other grounds, expressed “serious doubts about the validity of [these] assertions.”⁷⁷ Nevertheless, under current law, LFAs continue to seek to control network deployment by demanding a franchise before cable service is actually offered over that network.⁷⁸

The only conceivable justification for an LFA to require a franchise before construction begins would be in a situation in which it was dealing with a prospective cable operator that is not already providing service but seeks to place facilities in the public right-of-way. In this situation, the rationale would be that the franchise authority must approve the use of the public right-of-way before the prospective cable provider begins such use. This rationale, however, does not apply to a circumstance in which BellSouth seeks to offer cable service using its existing broadband network that has already been placed in the right-of-way.

In addition, as explained above, the work in the public rights-of-way required to enhance BellSouth’s broadband network also would enable the network to support video services. In either case, it is the same physical network, and increasing bandwidth in the network can be accomplished in most instances by adding electronics at the appropriate central office.

⁷⁶ *Tennessee Cable Telecommunications Association, et al., and Cable Television Association of Georgia, et al., v. BellSouth*, File No. E-97-10, *Memorandum Opinion and Order*, 15 FCC Rcd 7513, 7525, ¶ 18 (2000).

⁷⁷ *Id.*

⁷⁸ *See, e.g., Pacific Bell Telephone Company v. City of Walnut Creek*, No. C-05-4723 MMC (N.D. Cal. filed Nov. 17, 2005) (challenging a municipality’s conditioning of a permit for public right-of-way construction on a telecommunications carrier’s agreement not to provide video service “without first obtaining a cable franchise or an open video system franchise from the City”).

Moreover, if there were any upgrades that resulted in physical changes to facilities placed in the right of way, they would support a variety of services using the shared network, not just so called “cable services.” Thus, there is simply no point to a requirement that BellSouth obtain a cable franchise before beginning network upgrades that involve no additional use of the right-of-way beyond that which BellSouth has already been authorized to make.

However, the imposition of this requirement, while serving no valid purpose, would substantially delay BellSouth’s entry in the video market and substantially hinder competition. Again, in the cases noted above, BellSouth’s entry into a local cable market has been significantly delayed while going through the local franchise application process. Thus, if obtaining a franchise is a prerequisite to commencement of upgrades to its broadband network necessary to provide competitive video service, then BellSouth’s provision of this service would be delayed by the months required to enhance its network *in addition to* additional delays in the franchise application process itself. Again, given the fact that BellSouth is already utilizing the right-of-way as fully as it will after the franchise is granted, this additional delay serves no beneficial purpose and will merely serve to substantially hinder broadband and video competition.

IV. THE FCC HAS THE LEGAL AUTHORITY TO INTERPRET SECTION 621(A)(1) OF THE ACT.

In the *Notice of Proposed Rulemaking*, the Commission “tentatively conclude[d]” that it “has authority to implement Section 621(a)(1)’s directive that LFAs not unreasonably refuse to award competitive franchises.”⁷⁹ The *Notice of Proposed Rulemaking* solicits comments on this

⁷⁹ *Notice of Proposed Rulemaking*, ¶ 15.

tentative conclusion.⁸⁰ There can be no question that the Commission’s tentative conclusion is correct – Congress granted the Commission the authority to interpret Section 621, that such interpretation is entitled to deference, and that the regulations that arise from this proceeding are preemptive of inconsistent state and local laws, regulations, and practices. The Commission should exercise this authority by adopting the eight rules set forth above.

A. Congress Delegated Sweeping Authority To The Commission To Fill Gaps In The Communications Act.

Congress has made a textual commitment for the Commission to be the administrator of the Act.⁸¹ As the Supreme Court has explained, the Commission was designed “to serve as the ‘single Government agency’ with ‘unified jurisdiction’ and ‘regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio.’”⁸² Therefore, “[t]he Act grants the Commission broad responsibility to forge a rapid and efficient communications system, and broad authority to implement that responsibility. Courts have interpreted the agency’s powers liberally, recognizing that it was not the Congressional purpose to stereotype the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding.”⁸³

⁸⁰ *Id.*

⁸¹ See *Louisiana Public Service Comm’n v. FCC*, 476 U.S. 355, 360 (1986) (explaining that the Act grants the FCC broad authority to develop and regulate “interstate and foreign commerce in wire and radio communication”) (citing 47 U.S.C. § 151).

⁸² *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167-68 (1968) (quotation omitted).

⁸³ *United Telegraph Workers, AFL-CIO v. FCC*, 436 F.2d 920, 923 (D.C. Cir. 1970) (citations and quotations omitted).

In promulgating the Act, Congress thus conferred on the Commission broad and continuing rulemaking authority and expressly requires the Commission to make some of the fundamental determinations left open by the Act's text.⁸⁴ Because the duties imposed by the Act are not self-executing, the Act expressly relies upon the Commission to fill in the details and otherwise enforce its provisions.⁸⁵ "Thus, underlying the whole (Communications Act) is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."⁸⁶

The broad delegation of authority to the Commission in the Communications Act comports with the role of agencies generally. Congress has seen fit to enact statutes that establish broad goals and then delegate extensive authority to an executive agency to determine how to achieve those goals. "To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National

⁸⁴ See *Fulani v. FCC*, 49 F.3d 904, 914 (2d Cir. 1995) (recognizing that the Commission "has broad authority to establish individually tailored procedures to carry out its responsibilities under the [Communications] Act").

⁸⁵ See *Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) (noting that the Commission has "authority to fill gaps where the statute is silent"). In determining what practical construction has been given by an administrative agency to a regulation, courts have considered informal administrative practices as well as formal pronouncements to be relevant. See *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (employing deference to agency interpretation of its own rules even though presented in the form of an amicus brief).

⁸⁶ *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-73 (1968) (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940))

Government.”⁸⁷ This federal statutory framework has shifted an increasing share of authority from Congress to federal agencies and has solidified their central role in policy development and implementation. Hence, federal agencies have wide latitude and broad discretion in construing or interpreting the statutes they are charged with administering.⁸⁸

In *Chevron v. Natural Resources Defense Council*,⁸⁹ the Supreme Court further clarified the role of administrative agencies in interpreting and enforcing statutes by requiring federal courts to accord deference to reasonable agency interpretations of statutes. Under the familiar *Chevron* two-step analysis, courts are instructed to defer to an agency interpretation unless, first, Congress has directly spoken to the precise issue, or second, the agency’s construction does not fall within some reasonable interpretive range.⁹⁰ In construing an agency rule or regulation, courts must necessarily look to the administrative construction thereof where the meaning of the words used is in doubt.⁹¹

⁸⁷ *Loving v. United States*, 517 U.S. 748, 758 (1996); see also *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-530 (1935) (recognizing “the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly”).

⁸⁸ See, e.g., *Stinson v. United States*, 508 U.S. 36, 42-46 (1993); *Rehabilitation Ass’n of Virginia, Inc. v. Kozlowski*, 42 F.3d 1444, 1471 (4th Cir. 1994) (“Where an agency is given discretion to administer a complex and highly technical regulatory program, it is entitled to an even greater degree of deference from the courts.”); *Cook v. Babbitt*, 819 F. Supp. 1, 14 (D.D.C. 1993) (“The VPA, which is silent on the question of accuracy and thus gives the agency discretion to fill in this statutory gap”).

⁸⁹ 467 U.S. 837 (1984).

⁹⁰ *Id.* at 842.

⁹¹ See *United States v. Larionoff*, 431 U.S. 864, 872-73 (1977).

Chevron specifically left to agencies not only questions of substantive law, but also the choice of interpretive methodology.⁹² “The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”⁹³ This gap-filling authority recognized by the Court was premised on the idea that agencies generally possess greater substantive expertise than courts in giving substance to the general and undefined provisions of congressional enactments.⁹⁴ And whenever Congress has left a gap for an agency to fill, the agency’s regulation is given controlling weight unless it is arbitrary, capricious or manifestly contrary to statute.⁹⁵ As one court explained, where “the statute is silent on the issue, Congress has left a gap in the statutory scheme. From that gap springs executive discretion. As a matter of law, it is not for the courts, but for the executive agency charged with enforcing the statute . . . to choose how to fill such gaps.”⁹⁶

⁹² *Id.* at 862-63.

⁹³ *Id.* at 843-44; *see also FDA v. Brown & Williamson*, 529 U.S. 120, 159 (2000) (“Deference under *Chevron* to an agency’s construction of a statute that it administers is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”).

⁹⁴ *Nat’l Cable & Telecomm. Ass’n, Inc. v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005); *see also Hoosier Home Theater, Inc. v. Adkins*, 595 F. Supp. 389, 397 (D.C. Ind. 1984) (“[T]his Court is persuaded by the clear interpretation given the statute by the FCC, the agency most directly effected by the law and the agency possessing the institutional expertise relating to its proper interpretation, to which this Court must pay the deference normally due the opinions of expert agencies.”).

⁹⁵ *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 238-39 (2004). Even in the event that a statute’s language is clear and specific, a court must reject an agency interpretation only when that interpretation is contrary to the language of the statute. *Chevron*, 347 U.S. at 842-43.

⁹⁶ *Gonzalez v. Reno*, 212 F.3d 1338, 1348-1349 (11th Cir. 2000) (citations omitted).

This regulatory model validates the right of an agency to issue administrative orders that seek to clarify statutory language. And it accords with the Court's finding that where "legislative delegation to an agency on a particular question is implicit rather than explicit," a court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."⁹⁷ The *Chevron* decision thus recognizes the principle that to effectuate policy goals in the administrative state most efficiently, agencies must interpret and implement the statutes that establish their authority.⁹⁸

Accordingly, because of the broad grant of the authority to the Commission in the Communications Act and because "it is for agencies, not courts, to fill statutory gaps," the Commission has the power to provide content to aid in the interpretation and enforcement of a statutory provision in which ambiguities or gaps exist.⁹⁹ As explained below, Section 621 of the Cable Act falls comfortably within this rule.

B. Congress Specifically Granted The Commission Authority To Interpret and Implement the Cable Act.

The Commission's authority to interpret the Cable Act is beyond dispute. Like other provisions of the Communications Act, Congress charged the Commission "with the

⁹⁷ *Chevron*, 467 U.S. at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer and the principle of deference to administrative interpretations.").

⁹⁸ *See Coker v. Sullivan*, 902 F.2d 84, 89 (D.C. Cir. 1990) ("We have previously expressed hesitation to position this court as supreme supervisor of federal agency enforcement, a role more effectively performed by the Executive under congressional scrutiny.").

⁹⁹ *Brand X*, 125 S. Ct. 2699.

administration of the Cable Act”¹⁰⁰ and the Commission’s interpretation of the Cable Act is afforded “substantial deference.”¹⁰¹ As explained above, because the Commission is “interpreting a statute [that] it is charged with administering”¹⁰² such interpretations are reviewed under the deferential *Chevron* standard.¹⁰³

Section 621, which is entitled “general franchising requirements,” and outlines when a franchise to provide cable service is required and imposes limits on the obligations that franchising authorities’ may impose on cable operators.¹⁰⁴ In the initial 1984 rendition of the Cable Act, Congress permitted local franchising authorities to award incumbent cable operators with exclusive franchises.¹⁰⁵ In 1990, the Commission sent a Report to Congress, requesting that Congress amend the Cable Act to bar the grant of exclusive franchises and promote competition:

¹⁰⁰ *City of Chicago v. FCC*, 199 F.3d 424, 428 (7th Cir. 1999) (citing *Time Warner Cable v. Doyle*, 66 F.3d 867 (7th Cir. 1995)); see also *Am. Scholastic TV Programming Found. v. FCC*, 46 F.3d 1173, 1178 (D.C. Cir. 1995); *Daniels Cablevision v. San Elijo Ranch, Inc.*, 158 F. Supp. 2d 1178, 1182 (S.D. CA 2001) (noting that the “Federal Communications Commission [is] charged with the administration of the Cable Act”).

¹⁰¹ *Nat’l Cable Television Ass’n, Inc. v. FCC*, 33 F.3d 66, 70 (D.C. Cir. 1994) (giving “substantial deference” to the FCC’s interpretation of the Cable Act).

¹⁰² *Am. Scholastic TV Programming Found.*, 46 F.3d at 1178.

¹⁰³ *Id.*; see also *SBC Inc. v. FCC*, 414 F.3d 486, 496 (3d Cir. 2005) (quoting *Capital Network Sys. v. FCC*, 28 F.3d 201, 206 (D.C. Cir. 1994) (“The FCC is due substantial deference in its implementation of the Communications Act, and ‘even greater deference’ when interpreting its own rules and regulations”)).

¹⁰⁴ See 47 U.S.C. § 541.

¹⁰⁵ Congress enacted the 1984 Cable Act to “establish a national policy concerning cable communications” and to “minimize unnecessary regulation that would impose an undue economic burden on cable systems.” See *City of New York v. FCC*, 486 U.S. 57, 51 (1988) (quoting 47 U.S.C. §§ 521(1), (6)). Congress did so based on its finding that “free and open competition in the marketplace” and the “elimination of and prevention of artificial barriers to

To encourage more robust competition in the local video marketplace, the Congress should: (a) forbid local franchising authorities from unreasonably denying a franchise to potential competitors who are ready and able to provide service; (b) prohibit franchising rules whose intent or effect is to create unreasonable barriers to the entry of potential competing multichannel video providers; (c) limit local franchising requirements to appropriate governmental interests (e.g., public health and safety, repair and good condition of public rights-of-way, and the posting of an appropriate construction bond); and (d) permit competitors to enter a market pursuant to an initial, time-limited suspension of any “universal service” obligation.¹⁰⁶

In response, Congress amended the Cable Act in 1992 and eliminated the ability of state and local governments to award exclusive franchises and unreasonably refuse additional competitive franchises.¹⁰⁷ In so doing, Congress found that there were “benefits from competition between two cable systems,” and therefore “encouraged [local franchise authorities] to award second franchises.”¹⁰⁸

Today, marketplace evidence indicates that Congress’s and the Commission’s goal of encouraging competition is being frustrated by the unwarranted and unreasonable demands of certain LFAs. As explained above, LFAs have sought to impose onerous must build obligations, unduly delayed granting franchise applications, and attempted to exact other payments and concessions beyond the requirements of federal law. The effect has been to hinder video competition and delay infrastructure investment.

entry” were necessary preconditions to the development of competition in the cable industry. S. Rep. No. 97-518, at 14 (1982).

¹⁰⁶ *In the Matter of Competition, Rate Deregulation and the Commission’s Policies Relating to the Provision of Cable Television Service*, Report, 5 FCC Rcd 4962 ¶ 14 (1990).

¹⁰⁷ See 47 U.S.C. § 541(a)(1).

¹⁰⁸ S. Rep. No. 102-92, at 14 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1146. See also 47 U.S.C. §§ 541(a)(1); 555(a) & (b).

The Commission not only has the authority, but also has a duty to interpret what constitutes an “unresonabl[e] refus[a]” under Section 621 to ensure that Congress’s goal is not thwarted.¹⁰⁹ Notably, courts long have recognized that the Commission’s interpretations of the Cable Act – including interpretations of Section 621 – are reviewed under the *Chevron* standard. To this end, the D.C. Circuit and the Seventh Circuit have upheld three different Commission orders interpreting the “general franchising requirements” in Section 621 of the Act.¹¹⁰

A series of federal court of appeals decisions confirms this understanding of the Act. These cases explain that the Commission is empowered to interpret the franchising provisions of the Act and, most importantly, give content to undefined statutory terms (or greater content to already defined terms) to effectuate the oversight obligations Congress delegated in the Communications Act. The courts have confirmed that, in Section 621, Congress delegated to the Commission the task of determining the scope of the LFA’s franchising authority. These cases thus leave no doubt that the Commission, not the LFA, interprets Section 621 to determine when a franchise is required and the Commission has the authority to determine whether state and local practices violate its command that franchises not be unreasonably denied.

¹⁰⁹ See 47 U.S.C. § 541(a)(1).

¹¹⁰ In addition to Section 621, courts have applied the deferential *Chevron* standard of review to the Commission’s interpretations of other sections of the Cable Act. See, e.g., *City of New York v. FCC*, 486 U.S. 57 (1988) (upholding the Commission’s technical standards governing cable television channels and preemption of local franchising authorities under Section 624, 47 U.S.C. § 544); *Adelphia Communications Corp. v. FCC*, 88 F.3d 1250, 1257-58 (D.C. Cir. 1996) (upholding the Commission’s interpretation of Section 623 of the Act, 47 U.S.C. § 543); (*Time Warner Entm’t Co. v FCC*, 56 F.3d 151 (D.C. Cir. 1995) (same); *Am. Scholastic TV Programming Found. v. FCC*, 46 F.3d 1173, 1178 (D.C. Cir. 1995) (affirming the Commission’s interpretation of 613 of the Act, 47 U.S.C. § 533(b)). Note that Section 613(b) was later repealed by Section 302(b)(1) of the Telecommunications Act of 1996.

In *City of Chicago*, for example, the Seventh Circuit reviewed a Commission declaratory ruling, which found that an operator of a satellite master antenna television system was not a “cable operator” of a “cable system” under Section 602(5) &(7) and therefore did not need to obtain a franchise under Section 621 of the Act.¹¹¹ Several parties challenged the Commission’s authority under the Cable Act and, in particular, to interpret Section 621 and determine when an entity needs to obtain a cable franchise from local franchising authorities. The Seventh Circuit flatly rejected this claim and highlighted the untenable regime suggested by those who challenged the Commission’s authority to interpret Section 621: “Some parties contend that the FCC was not granted regulatory authority over 47 U.S.C. § 541 [Section 621 of the Act], the statute setting out general franchise requirements. We disagree. ... We are not convinced that the FCC has well-accepted authority under the Act but lacks authority to interpret [47 U.S.C.] § 541 [Section 621 of the Act] and to determine what systems are exempt from franchising requirements.”¹¹² In reviewing the Commission’s findings, the Court properly applied *Chevron* deference and upheld the Commission’s interpretation as reasonable.¹¹³

In *Nat’l Cable Television Ass’n, Inc. v. FCC*,¹¹⁴ the D.C. Circuit likewise made clear that the FCC has the authority to interpret the franchising provisions in Section 621 as well as the

¹¹¹ *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999).

¹¹² *Id.* at 428 (citing *Nat’l Cable Television Ass’n, Inc. v. FCC*, 33 F.3d 66, 70 (D.C. Cir. 1994)).

¹¹³ *Id.* at 429, 432.

¹¹⁴ 33 F.3d 66, 70 (D.C. Cir. 1994).

definition of “cable service,” “cable operator” and “cable system” in Section 602.¹¹⁵ Applying the *Chevron* standard, the court afforded the Commission “substantial deference” and explained that where Congress “has not ‘directly spoken to the precise question at issue,’ we must defer to the agency’s interpretation if it is merely ‘rational and based upon a permissible construction of the statute.’”¹¹⁶ Thus, as the court found, even where Congress left the statutory term at issue undefined,¹¹⁷ the Commission’s findings that a franchise was not required under Section 621 was sustained as “eminently reasonable.”¹¹⁸ Similarly, in *ACLU v. FCC*,¹¹⁹ the D.C. Circuit reviewed the Commission’s “interpretative rules” concerning the anti-redlining provision in Section 621(a)(3). The Court found that the Commission’s interpretation was consistent with the Act and was reasonable. The Court again rejected challenges to the Commission’s authority and upheld the Commission’s findings.¹²⁰

These judicial precedents plainly confirm the Commission’s authority to interpret Section 621. In this case, Congress did not define the term “unreasonably refuse” in the Act. Congress thus left a regulatory gap for the FCC to fill. In circumstances where “[t]he Cable Act does not

¹¹⁵ See 47 U.S.C. § 522(6) (cable service); *Id.* at § 522(5) (cable operator); *Id.* at § 522(7) (cable system).

¹¹⁶ *Nat’l Cable Television Ass’n, Inc.*, 33 F.3d at 71 (quoting *Chevron U.S.A., Inc. v. Natural Res. Defense Counsel, Inc.* 467 U.S. 837, 842 (1984), *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 113 (1987)).

¹¹⁷ *Nat’l Cable Television Ass’n, Inc.*, 33 F.3d at 71-73.

¹¹⁸ *Id.* at 75.

¹¹⁹ 823 F.2d 1554 (D.C. Cir. 1987).

¹²⁰ *Id.* at 1579-80.

define the term . . . [courts] will uphold the agency's definition of that term if it is reasonable.”¹²¹

The Commission has the authority to interpret what constitutes an unreasonable refusal under Section 621,¹²² and the Commission should exercise that authority by adopting the eight rules BellSouth has proposed.

C. Courts Have Upheld the Commission's Interpretation Of The Communications Act Under Similar Circumstances.

Courts have also recognized the Commission's authority to adopt standards for states to implement in other sections of the Communications Act. Thus, the fact that the Commission's definition of “unreasonabl[e] refus[al]” will apply to state authorities and be reviewed by the courts does not alter the Commission's legal authority. Indeed, the Supreme Court has upheld this precise scenario.

In *AT&T v. Iowa Utilities*,¹²³ the Supreme Court confirmed that the Commission had the authority to interpret Section 252(d)(2)'s pricing standard for unbundled network elements even though the Act charged state commissions with establishing rates for individual network elements and ensuring that such rates are “just and reasonable.” The Court made clear that the Commission had authority to interpret the parameters of a pricing methodology for states to implement.

¹²¹ *Nat'l Cable Television Ass'n, Inc.*, 33 F.3d at 71.

¹²² Moreover, the Commission has on numerous occasions defined what is “reasonable” or “unreasonable”; this case is no different. *See, e.g., Implementation of Sections Of The Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, ¶ 1 (1993) (establishing rules to ensure that basic cable services rates are reasonable).

¹²³ 525 U.S. 366, 378 (1999).

Here too, the Commission is implementing a standard for what constitutes an “unreasonable” refusal by local franchising authorities. And, as with Section 621(a)(1), state decisions regarding the application of the Section 252(d)(2) pricing standard were appealed to courts – not the Commission. The fact that an aggrieved applicant will appeal to the courts for review does not alter the Commission’s authority to interpret a term in a statute it is charged with administering.

D. The Commission’s Authority Under Other Provisions of the Communications Act Complements Its Authority Under Title VI.

In the *Notice of Proposed Rulemaking*, the Commission also sought comment on “possible sources of Commission authority, other than Section 621(a)(1), to address problems caused by the local franchising process.”¹²⁴ The Commission correctly noted that it has ancillary authority that complements its Title VI authority to interpret Section 621. Foremost, Section 706 mandates that the Commission encourage the deployment of advanced telecommunications services. This obligation compels the Commission to interpret Section 621(a)(1) in a manner that furthers this pivotal goal. Similarly, any ambiguity regarding the Commission’s authority under Title VI should be read liberally, in accordance with the Commission’s complementary authority under Title I.

¹²⁴ *Notice of Proposed Rulemaking*, ¶ 18.

1. Section 706 Requires The Commission To Encourage Deployment Of Advanced Telecommunications Services.

Section 706(a) of the Act mandates that the Commission shall “encourage the deployment ... of advanced telecommunications capability to all Americans.”¹²⁵ Notably, advanced telecommunications capability is defined “without regard to any transmission media or technology.”¹²⁶ The provision’s legislative history makes clear that Congress wanted the Commission to encourage the deployment of video services under the Commission’s Section 706 authority. Indeed, Congress explained that Section 706:

is intended to establish a national policy framework designed to accelerate the rapidly the private sector deployment of advanced telecommunications. . . . The goal is to accelerate deployment of advanced capability that will enable subscribers in all parts of the United States to send and receive information in all its forms – voice, data, graphics, and *video* - over a high-speed switched, interactive, broadband, transmission capability.¹²⁷

The Commission previously has relied upon its authority in Section 706 to promote broadband competition. In particular, the Commission has recognized that “section 706(a) directs the Commission to use the authority granted in other provisions . . . to encourage the deployment of advanced services.”¹²⁸ Likewise, the Commission has found that Section 706

¹²⁵ See 47 U.S.C. § 157(a) nt.

¹²⁶ *Id.* § 706(c)(1), 47 U.S.C. § 157(c)(1) nt.

¹²⁷ See S. Rep. No. 104-23, at 50-51 (1995) (emphasis added). The Commission likewise has recognized that “[b]roadband technologies, which encompass all evolving high-speed digital technologies that provide consumers integrated access to voice, high-speed data, video-on-demand, and interactive delivery services, are a fundamental component of the communications revolution.” See FCC, Strategic Goals, Broadband available at <http://www.fcc.gov/broadband/>.

¹²⁸ *Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd 24011, 24045, ¶ 69 (1998).

“provide[s] the Commission with a specific mandate to encourage broadband deployment, generally, and to promote and preserve a freely competitive Internet market, specifically. Indeed, Congress mandated that the Commission encourage broadband capability ‘without regard to any transmission media or technology’ and ‘remove barriers to infrastructure investment.’”¹²⁹ The Commission thus has a duty to interpret Section 621(a)(1) in a manner that promotes the deployment of advanced telecommunications services and to ensure that the federal goal is not frustrated by inconsistent interpretations of the statute.

Courts have recognized the importance of Congress’s dictate in Section 706 and have upheld Commission decisions that relied upon such principles.¹³⁰ The D.C. Circuit found that the Commission has the authority to consider Section 706’s goals when the Commission balances other non-exclusive principles in the Act.¹³¹ Likewise, the D.C. Circuit upheld the Commission’s findings that the interests of Section 706 outweighed countervailing factors that

¹²⁹ See *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking*, CC Docket No. 02-33, 36 CR 944, ¶ 77 (Sept. 23, 2005); see also *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 15856, ¶ 7 (2004); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶ 213 (2003); See *Petition of Qwest Corporation For Forbearance Pursuant to 47 U.S.C. sec. 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Dkt. No. 04-223, FCC 05-170, ¶ 107 (Dec. 2, 2005).

¹³⁰ See, e.g., *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

¹³¹ *USTA* 359 F.3d at 580, 583 (allowing Commission to include Section 706 among the principles it weighed for purposes of applying § 251(d)(2) factors because those factors were not exclusive).

were expressly enumerated in other sections of the Act.¹³² The Commission therefore not only has the authority to interpret Section 621(a)(1), but also must do so in a manner that encourages broadband deployment.

2. The Commission's Authority Must Be Construed Liberally.

The Commission's authority under Title I of the Act, Sections 151, 152 and 154(i),¹³³ complement the Commission's authority under Sections 621(a)(1) and 706.¹³⁴ While the Commission cannot, pursuant to its Title I authority, take actions inconsistent with Title VI or other provisions of the Act, the Commission's Title I authority does empower the Commission to enact rules and regulations that are "necessary" to execute its duties.¹³⁵

¹³² See *USTA*, 359 F.3d at 580, 583 ("[T]he Commission reasonably interpreted § 251(c)(3) to allow it to withhold unbundling orders, even in the face of some impairment, where such unbundling would pose excessive impediments to infrastructure investment.").

¹³³ Section 4(i) of the Act empowers the Commission to enact rules and regulations that are "necessary" to execute its duties. See 47 U.S.C. § 154(i).

¹³⁴ See *Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 798-799 (D.C. Cir. 2002) ("Contrary to the FCC's arguments suggesting otherwise, § 1, 47 U.S.C. § 151, does not give the FCC unlimited authority to act as it sees fit ... without regard to the scope of the proposed regulations. We hold that where, as in this case, the FCC promulgates regulations that significantly implicate program content, § 1 is not a source of authority. Because the FCC can point to no other statutory authority, the video description regulations must be vacated.") *Id.* at 806 ("It is important to emphasize that section 4(i) is not a stand-alone basis of authority and cannot be read in isolation. It is more akin to a 'necessary and proper' clause. Section 4(i)'s authority must be 'reasonably ancillary' to other express provisions. And, by its express terms, our exercise of that authority cannot be 'inconsistent' with other provisions of the Act. The reason for these limitations is plain: Were an agency afforded *carte blanche* under such a broad provision, irrespective of subsequent congressional acts that did not squarely prohibit action, it would be able to expand greatly its regulatory reach.") (quoting Powell, *Dissenting Implementation of Video Description of Video Programming*, 15 FCC Rcd 15230, 15276 (2000)).

¹³⁵ See 47 U.S.C. § 154(i).

If there is any lingering concern regarding the scope of the Commission’s authority to interpret what constitutes an unreasonable refusal under Section 621(a)(1), therefore, Congress affirmatively gave the Commission authority to take “necessary” actions in Title I of the Act. Given the uncontroverted evidence regarding the deterrent and delayed impact that local franchising authorities’ actions are having on competition and broadband deployment, it is “necessary” for the FCC to exercise its authority under Section 621 to encourage competition and broadband deployment.

E. The Commission’s Interpretation Of Section 621 Is Preemptive.

Given the Commission’s authority to interpret the provisions of the Act, the *Notice of Proposed Rulemaking* rightly concluded that the Commission has authority to preempt local franchising authorities’ actions that are at odds with its tentative conclusion – here, to preempt actions that constitute an unreasonable refusal to grant a franchise.¹³⁶ The Constitution’s Supremacy Clause mandates that “the Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby”¹³⁷ Federal preemption of state law, pursuant to the Supremacy Clause, can take three forms: (1) express preemption; (2) conflict preemption; and (3) field preemption.¹³⁸ Importantly, “for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that

¹³⁶ *Notice of Proposed Rulemaking* ¶ 15.

¹³⁷ U.S. Const. art. VI §2; *see also McCulloch v Maryland*, 17 U.S. 316 (1819).

¹³⁸ *See Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 604-05 (1991).

of statewide laws.”¹³⁹ Here, the state and local laws at issue are subject to both express and conflict preemption.¹⁴⁰

1. Section 636(c) Of The Cable Act Expressly Preempts State And Local Laws Inconsistent With Section 621.

Section 636 of the Cable Act, by its plain terms, *expressly* provides that “any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded.” 47 U.S.C. § 556(c). By enacting Section 636(c), Congress “manifested its intent to preempt state law explicitly in the language of the statute.”¹⁴¹ Indeed, the First Circuit recently held that Section 636 made it “‘unmistakably clear’ that the Cable Act will preempt any inconsistent state or local law.”¹⁴² Here, for the reasons set forth above, a number of LFA practices are inconsistent with the Cable Act. A Commission determination that certain state and local actions are inconsistent with the Act triggers the express preemption of Section 636(c).

¹³⁹ *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

¹⁴⁰ In fact, even the Supreme Court made clear that the FCC had the requisite authority to preempt inconsistent state cable regulations even before the enactment of Section 636. *See Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984).

¹⁴¹ *Hughes v. Attorney Gen. of Fla.*, 377 F.3d 1258, 1265 (11th Cir. 2004) (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 79, 110 S. Ct. 2270, 2275 (1990)).

¹⁴² *See Liberty Cablevision of P.R., Inc. v. Municipality of Caguas*, 417 F.3d 216, 220 (1st Cir. 2005) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991)).

2. State And Local Laws That Impede Competitive Entry Into The Cable Market Conflict With And Frustrate The Objectives Of Congress.

The Supreme Court has consistently maintained that a federal agency “‘acting within the scope of its congressionally delegated authority may preempt state regulation’ and hence render unenforceable state and local laws that are otherwise not inconsistent with federal law.”¹⁴³ To this end, the agency may exercise its preemption authority *without* an “express congressional authorization to displace state law.”¹⁴⁴ Instead, the agency must merely establish that preemption is necessary to “reasonab[ly] accomodat[e] ... conflicting policies that were committed to the agency’s care by the statute.”¹⁴⁵ In short, “if the FCC has resolved to preempt an area of cable television regulation and if this determination represents a reasonable accommodation of conflicting policies’ that are within the agency’s domain we must conclude that all conflicting state regulations have been precluded.”¹⁴⁶

“Conflict preemption exists where state law actually conflicts with federal law, making it impossible to comply with both, or where the state law stands as an obstacle to the

¹⁴³ *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988) (quoting *Louisiana Public Serv. Comm’n v. FCC*, 478 U.S. 355, 368-69 (1986)).

¹⁴⁴ *Id.* at 63 (citations and quotations omitted).

¹⁴⁵ *Id.* at 61 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)). Judicial review of agency preemption of conflicting state laws “does not involve a ‘presumption against pre-emption.’” *New York v. FERC*, 535 U.S. 1, 18 (2002).

¹⁴⁶ *Capital Cities Cable, Inc.*, 467 U.S. at 700; *see also Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1103 (holding that the Cable Act preempted the Utah Cable Television Programming Decency Act).

accomplishment and execution of the full purposes and objectives of Congress.”¹⁴⁷ In particular, an agency can preempt any state law that touches on a subject matter over which Congress has delegated to that agency regulatory authority.¹⁴⁸ Conflict preemption applies with equal force to federal regulations.¹⁴⁹ For this reason, “[w]henver state regulation would frustrate achievement of a federal regulatory objective, FCC jurisdiction is paramount and conflicting state enactments must yield.”¹⁵⁰

Importantly, “[f]ederal regulation need not be heavy-handed in order to preempt state regulation.”¹⁵¹ In *CCIA*, for example, the Commission established a “vacuum of deregulation” by discontinuing regulation of CPE [Customer Premises Equipment] under Title II of the Communications Act and substituting a new set of rules based on competition and market forces. The D.C. Circuit concluded that the new rules nullified state laws notwithstanding the fact that

¹⁴⁷ *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 768 (11th Cir. 1998) (citations and quotations omitted); *see also Mount Olivet Cemetery Ass’n v. Salt Lake City*, 164 F.3d 480, 486 (10th Cir. 1998).

¹⁴⁸ *See City of New York*, 486 U.S. at 63-64.

¹⁴⁹ *See City of New York*, 486 U.S. at 63 (“The phrase ‘Laws of the United States’ encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization.”); *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153 (1982) (“Federal regulations have no less preemptive effect than federal statutes.”); *Louisiana Public Service Comm’n*, 476 U.S. at 368-369 (“[A] federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.”).

¹⁵⁰ *State Corp. Comm’n of State of Kan. v. FCC*, 787 F.2d 1421, 1426 (10th Cir. 1986) (citing *Computer & Communications Industry Association v. FCC*, 693 F.2d 198, 214-15 (D.C. Cir. 1982)) (other citations omitted); *see also North Carolina Utils. Comm’n v. FCC*, 552 F.2d at 1036, 1046 (4th Cir. 1977) (“FCC regulations must preempt any contrary state regulations where the efficiency . . . of the national communications network is at stake . . .”).

¹⁵¹ *CCIA*, 693 F.2d at 217.

the restrictions were *less* burdensome than the ones the states sought to impose. The Commission’s “policy favoring regulation by market forces” over command-and-control governmental oversight “is neither arbitrary, capricious, nor an abuse of discretion,” and therefore validly preempted state law.¹⁵² In the end, “[w]here a state statute conflicts with, or frustrates, federal law, the former must give way.”¹⁵³

State and local laws that violate Section 621 certainly stand as an obstacle to the accomplishment of longstanding federal objectives. Congress enacted the Cable Act, *inter alia*, to encourage competition in the cable marketplace. For this reason, the Commission explained that this *Notice of Proposed Rulemaking* is intended “to ensure that the local franchising process does not undermine the well-established policy goal of increased MVPD competition and, in particular, greater cable competition within a given franchise territory.”¹⁵⁴ Moreover, as explained above, encouraging the rapid deployment of broadband is a paramount federal objective. Accordingly, state and local laws that run contrary to these evident federal objectives stand as obstacles to Congress’s stated desire for increased cable competition and rapid broadband deployment. To facilitate such competition and deployment, the Commission should adopt the eight rules outlined above.

¹⁵² *Id.*; see also *New York State Comm’n*, 749 F.2d at 811 (emphasizing that, “beyond question,” the FCC may “allow the marketplace to substitute for direct Commission regulation”).

¹⁵³ *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663-664 (1993) (citing U.S. CONST., Art. VI, cl. 2) (other citation omitted).

¹⁵⁴ *Notice*, ¶ 17. The Commission also found that “the 1992 Cable Act’s revisions to Section 621(a)(1) indicate that Congress considered the goal of greater cable competition to be sufficiently important to justify the Commission’s adoption of rules.” *Id.*

V. CONCLUSION

It is clear that the franchising process hampers video competition under even the best of circumstances. Moreover, this process is largely unnecessary in the current competitive environment, particularly with respect to attempts to regulate right-of-way access by broadband video providers that already have access to the public rights-of-way. Allowing LFAs unbridled discretion to impose requirements on broadband video providers has a demonstrable negative effect on both video competition and broadband deployment. To reverse these trends, the Commission should adopt the rules proposed by BellSouth, which would ensure that LFA actions no longer constitute an unreasonable refusal to award a competitive cable franchise within the meaning of section 621(a).

Respectfully submitted,

BELLSOUTH CORPORATION

By: /s/ J. Phillip Carver
Richard M. Sbaratta
J. Phillip Carver
Suite 4300
675 West Peachtree Street, N.E.
Atlanta, Georgia 30375-0001
(404) 335-0710

Bennett L. Ross
Suite 900
1133 21st Street, NW
Washington, D.C. 20036-3390
(202) 463-4113

Date: February 13, 2006

CERTIFICATE OF SERVICE

I do hereby certify that I have this 13th day of February 2006 served the following parties to this action with a copy of the foregoing **COMMENTS OF BELLSOUTH** by electronic filing, addressed to the parties listed below.

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
The Portals, 445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Best Copy and Printing, Inc.
The Portals, 445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554

/s/ Anthony V. Jones
Anthony V. Jones

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Implementation of Section 621(a)(1)
of the Cable Communications Policy
Act of 1984, as amended by the Cable
Television Consumer Protection and
Competition Act of 1992

MB Docket No. 05-311

DECLARATION OF THOMPSON (TOM) T. BAWLS II

Being of lawful age, and duly sworn upon oath, I do hereby depose and state:

1. My name is Thompson (Tom) T. Rawls II, and I am currently employed by BellSouth Corporation ("BellSouth") as Chief Counsel - Internet, Broadband & Video. I have been employed in my current position since the spring of 2001. Prior to that, I served from 1995 to 2001 as General Counsel to BellSouth's video services affiliate BellSouth Interactive Media Services, Inc., the predecessor in interest to BellSouth Entertainment, LLC (collectively referred to herein as "BEI"), which is BellSouth's current video services affiliate. This declaration is being filed in support of BellSouth's comments filed in the Federal Communication Commission's Notice of Inquiry for its Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (Dkt No. 05-255).
2. Shortly after the Telecommunications Act of 1996 ("1996 Act") was passed by Congress, BellSouth, acting through its video affiliate BEI filed numerous franchise applications for authorization to provide cable services in dozens of local communities, primarily in

certain parts of Florida, Atlanta Georgia and Memphis, Tennessee. During the time period from 1995 to 2001, I was responsible for overseeing all legal work provided in support of BEI, including legal work and advice provided in connection with processing its cable franchise applications. The facts set forth in this statement are true and correct to the best of my information and belief, and are based on my personal knowledge and direct involvement in those events as well as documents and records in related company files that remain under my custody and control.

3. Attached as Exhibit A is a matrix outlining the 20 communities in which BellSouth has obtained a local cable franchise. BEI is currently providing competitive cable services under those authorizations to approximately 40,000 subscribers in 14 of those communities.
4. Exhibit A includes the date BellSouth filed its application to the Local Franchise Authority ("LFAs") to provide cable services and the date that application was granted. As Exhibit A reflects, on average it took BellSouth 10 months to negotiate a successful local cable franchise. Interestingly, it shows that it took BellSouth 5 months longer on average (i.e., 12 months) to negotiate a cable franchise in Florida, a "level playing field statute" state, than to negotiate a cable franchise in Georgia (i.e., 7 months), a non-level playing field statute state. Of this sampling, the shortest time required for BellSouth to obtain a franchise from the time it filed its initial application request was 1.5 months for the small town of Woodstock, Georgia, while a few took up to 2 or more years.

5. The local cable franchising process is administratively cumbersome, slow, costly, and fraught with numerous local political perils and litigation risks. This is particularly true for but certainly not limited to states that have adopted at the behest of the incumbent cable industry lobby so called "Level Playing Field Statutes" (LPFS). BellSouth provides traditional local telephone service in two states (Florida and Tennessee) that have adopted LPFS.
6. In a nut shell, LPFS prohibit local governments from granting a cable franchise to a competitive cable service provider that "is more favorable or less burdensome" than the incumbent's cable franchise. Although undoubtedly well intended from the state legislator's point of view, these statutes frequently operate or are used by the incumbent cable operator, as highlighted below, as barriers to competitive entry. Significantly, and not by accident considering their source, these statutes only protect incumbent cable operators and do not prohibit a LFA from imposing conditions on new video competitors that are "more burdensome or less favorable" than the incumbent cable operator's franchise.
7. In addition to LPFS, many cable operators have succeeded during franchise renewal proceedings in persuading LFAs to adopt quasi-LPFS cable ordinances that mirror these state statutes where they have been unsuccessful in persuading state legislatures to adopt such restrictions. Thus, the adverse effects of these restrictions on video competition are by no means limited to LPFS states.

8. In all fairness, one needs to live through a local cable franchise proceeding to truly appreciate how difficult, frustratingly slow and inappropriate the process is for today's new broadband competitive service environment. However, since most policy makers at both the federal and state level have had little or no opportunity to experience the local cable franchising process first hand, I have set forth below a summary description of a few of BellSouth's experiences from which policy makers are free to draw their own conclusions.

The City of Germantown, Tennessee

9. In 1996, BellSouth filed applications for authority to provide cable services in Shelby County Tennessee (a suburb of Memphis) and in the two largest cities located within the Shelby County boundaries- Bartlett and Germantown. BellSouth was successful in getting a cable franchise to serve the City of Bartlett in record time (only 3.5 months). However, after 5 months of negotiating with officials and the consultant firm representing Germantown, BellSouth reached an impasse with Germantown officials who insisted that BellSouth agree to overbuild all of Germantown and the incumbent operator in 5 years.
10. On March 18, 1997, an attorney representing Time Warner, the incumbent cable operator, sent a letter to Germantown officials, claiming that it would be a violation of the LPFS not to impose this build-out requirement on BellSouth. Notwithstanding BellSouth's legal arguments to the contrary, the City sided with Time Warner, and BellSouth was forced to withdraw its application. The month after BellSouth withdrew its application,

Germantown and Time Warner reached a tentative renewal agreement of the incumbent's cable franchise after 2 ½ years of negotiations.

11. Since Germantown represented a significant percentage of the contiguous land area and population of Shelby County and the economics supporting BellSouth's business plan to build a video headend and offer competitive video services in the area, BellSouth elected to withdraw its Shelby County application and never activated the Bartlett franchise. To the best of BellSouth's information and belief, the citizens of those communities are still without a choice of competitive cable service providers.

The City of Coral Springs, Florida

12. In the summer of 1996, BellSouth, acting through its cable affiliate BEI, filed an application for a cable franchise to serve the City of Coral Springs, Florida, a community located in South Eastern Florida. The City hired a consultant to assist it in negotiations. After conducting a field investigation of the BellSouth's local telephone service affiliate's (BellSouth Telecommunications, Inc. or "BST") construction in the area, the City's consultant issued a report to the City concluding that "BellSouth is installing a video distribution system which can readily be used as a cable television distribution system simply by feeding the system with the appropriate electronic circuitry."
13. This quickly led to an argument between BST and the City as to the legal right of BST to construct video broadband capable communications facilities in the public rights-of-way under its local telephone rights prior to obtaining a cable franchise. Furthermore, the

consultant followed that up with a draft proposal to impose a number of unreasonable cable franchise requirements on BEI that would result in placing "more burdensome and less favorable" franchise requirements on BellSouth than the incumbent cable operator, a proposal that was not prohibited by the anti-competitive LPFS. Given the relatively high cost and economic risk of entering the wireline video marketplace, BEI elected to withdraw its City of Coral Springs cable franchise application and devote its resources to other opportunities in the South Florida area.

Miami-Dade County, Florida

14. In the summer of 1996, BEI filed an application for local franchise authority to provide cable services in the Miami-Dade County area. Miami-Dade County still is and was at the time by total population (in excess of 2 million) and households (approximately 1 million) the largest single LFA in the state of Florida. At the time of BEI's application, there were 7 incumbent cable operators serving the Miami-Dade County area, none of which competed with each other in any material way.
15. Four of the incumbent cable operators filed extensive written objections to BEI's franchise application, including numerous LPFS objections. After a few months of good faith and cooperative discussions with the LFA's professional staff, BEI filed extensive amendments to its franchise application and sought an amendment to the local cable ordinance that would eliminate the 5 year build-out requirement and allow any cable operator, including all 7 of the incumbent operators, to enter the service territory of any other cable operator in the LFA's jurisdiction to provide a competitive cable service

without a build-out requirement. Nine months after filing its application, the LFA adopted an amendment eliminating the build-out requirement and granted BEI a cable franchise over the strenuous legal and business objections of the incumbent cable operators.

16. The objections of the incumbent operators were too numerous to list here, but suffice it to say that they primarily centered on claims that removal of the build-out requirement violated the LPFS, that removing the build-out requirement would lead to "cherry picking" and "red-lining" (notwithstanding BellSouth's agreement not to engage in red-lining), and that the LFA should not grant BEI's franchise until it conducted a comprehensive study to determine whether having BellSouth construct video capable facilities in the public rights-of-way would be adverse to the public interest and endanger the public safety and convenience by placing too great of a burden on public rights-of-way and utility poles.
17. The Miami-Dade County local cable franchising "experience" did not end with the grant of the cable franchise. BEI's cable franchise was approved on April 15, 1997. In May of 1997, the 7 incumbent cable operators pooled their funds and sued Miami-Dade County in both state and federal court seeking a declaratory ruling that the grant violated the local cable ordinance and state law, including but not limited to the LPFS, and injunctive relief blocking BEI from providing service. BEI was joined as a party defendant in both actions.

18. Nine months and hundreds of thousands of dollars in attorney fees later, the state court entered summary judgment in favor of the Defendants Miami-Dade County and BellSouth. The following month, the US District Court for the Southern District of Florida dismissed the federal action on grounds that the final state court action constituted res judicata of the Plaintiffs' claims, basically concluding that the Defendants had been sued in two separate lawsuits for the same claims and that they only had to win once. Both rulings were appealed by the incumbent cable operators and both decisions were affirmed on appeal.
19. Approximately 3 years after it filed its application for authority to provide cable services, BEI was free to commence the provision of cable services in Miami-Dade County without the risk of its local franchise being declared void for violating the LPFS or for having been issued pursuant to an illegal action by the LFA.

DeKalb County, Georgia

20. On June 24, 1996, BellSouth filed an application for a local cable franchise to provide cable services in DeKalb County, Georgia. The franchise was granted relatively quickly after 5 months of intensive negotiations with the LFA staff and an outside legal consultant. However, the process was anything but smooth.
21. BellSouth found itself in a peculiar situation in DeKalb. BellSouth had initially planned to conduct a video dialtone service trial in DeKalb County and had already constructed video capable transmission facilities passing approximately 4,000 homes in DeKalb and

an additional 3,000 homes in a contiguous portion of the City of Chamblee. Before it was in a position to start the video dialtone trial, the 1996 Act was passed allowing BellSouth to provide video entertainment services under a different and superior model.

22. To make a long story short, BEI had already made the investment and built the facilities but couldn't use those facilities to provide competitive video entertainment services without a cable franchise. Consequently, BEI was required to agree to some of the most onerous franchise terms it has ever agreed to, including:

- a mandatory and non-market driven build-out requirement to ensure that it would deploy facilities and services to several thousand additional homes that were not in BEI's initial video service plan but located in a politically sensitive area deemed necessary to win approval of the franchise;
- an annual per subscriber PEG capital facilities and equipment support payment (ranging approximately \$4.50 to \$2.50/sub/yr over several years) in addition to the 5% local cable franchise fee;
- an Institutional Network (I-Net) support obligation equal to BEI's pro rata per subscriber share of the incumbent cable operator's cost of providing I-Net facilities to the County, based on a maximum total I-Net cost of \$2,000,000, also in addition to the 5% franchise fee;
- an obligation to provide up to 10% of BEI's spare conduit capacity for County use; and
- a long list of special and miscellaneous operational, facility and customer service requirements.

23. The two incumbent cable operators (Scripps Howard and MediaOne) serving DeKalb County were not pleased with BEI's entry into the cable service business. Two days before the public hearing to approve BEI's franchise agreement, Scripps Howard's attorney sent a November 25, 1996 letter to the DeKalb County Commissioners (1) asking them to impose a 5 year buildout requirement for BEI's entire service area, (2) raising concerns about "cherry picking," (3) asking the Commission to investigate whether granting BEI a cable franchise would constitute a violation of the federal MMDS cross-ownership restriction set forth in 47 U.S.C. § 533 given that one of BEI's affiliates (BellSouth Wireless Cable, Inc.) had an MMDS spectrum license covering the same area, and (4) arguing that the Commission should ensure a level playing field and not grant a franchise more favorable or less burdensome than theirs to BellSouth. Much to the DeKalb County Commission's credit, the franchise was granted over these last minute objections.

St. Johns County, Florida

24. The St. Johns County, Florida franchise was a two step process. The initial cable franchise was granted under the rural exemption to the pre-1996 Act cross-ownership restriction that prohibited telephone companies and their affiliates from providing cable services where they also provided local telephone services. The initial franchise only granted authority to provide cable services within a relatively small area of the county containing a new development called World Golf Village. On December 10, 1996, before the development was completed or service was activated and following adoption of the 1996 Telecom Act removing the cross-ownership restriction, BEI filed an amended

application seeking authority to extend its cable franchise authorization to include all of the adjacent incumbent cable operator's (Continental Cablevision or "Continental") service area.

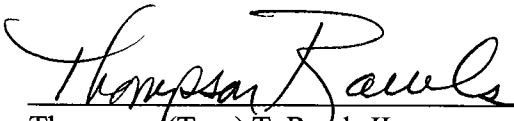
25. Continental vigorously opposed BEI's franchise application to extend its competitive video service into Continental's service area. Attorneys representing Continental filed a number of written objections to BEI's application which was essentially a "me-too" version of the previously granted franchise. Continental's (later acquired by MediaOne) main objection was that BEI's application and proposed franchise agreement would allow it to "cherry-pick" and did not satisfy the LPFS because it lacked build-out and density requirements, an objection that was overcome by amending the local cable ordinance to remove the build-out requirement for all cable operators. Continental "suggested" to the County Attorney that BEI's "overbuild" be required to be accomplished in 2 years for most if not all of the county.
26. BEI's application was also opposed by Time Warner, the incumbent cable operator which at the time served the City of St. Augustine, Florida, which is also located in St. John's County. Even though BEI was not asking for authority to provide service in Time Warner's franchise area, Time Warner claimed that granting the franchise would give BellSouth the right to "cherry-pick" and that the LPFS requires BEI to meet the same 5 year buildout and line extension requirements that were in the Time Warner cable franchise, an interesting argument inasmuch as there was no overlap in service areas.

27. One year after the application seeking authority to extend the existing franchise service area was filed and after numerous amendments to BEI's application and the adoption of extensive amendments to the local cable ordinance, including elimination of the build-out requirement for overlapping systems, BEI's amended franchise was approved.
28. The above examples highlight some of the more difficult encounters BellSouth experienced with the local cable franchising process. By no means do they represent an exhaustive list of the many political, legal, operational and business difficulties associated with obtaining and operating under local cable franchises, nor do they represent all of the franchise applications listed in Exhibit A that were difficult or significantly delayed in being approved. Furthermore, neither Exhibit A nor my Declaration can adequately convey the time devoted to the numerous meetings and negotiations that take place with local professional staff and public officials, attendance at public hearings and the detailed cable ordinance application procedures that must be followed as part of almost any franchise approval and cable ordinance amendment process.
29. It must be noted that the above examples represent 5 problem franchises in a very limited universe. If BellSouth and the other large local telecommunications companies are required to secure hundreds and possibly even thousands of additional cable franchises to provide their existing telephone service customers a competitive choice in video services over their existing but newly upgraded broadband transmission facilities, then one can

reasonably anticipate having to multiply these difficulties and delays many times over if the existing cable regulatory model is not changed and changed quickly.

30. With only a few minor exceptions, almost all of the 14 cable franchises under which BellSouth currently provides cable service have no facilities build-out requirement. Notwithstanding the cable industry's mantra that this will lead to "red-lining," in the eight or nine years BellSouth has been operating under these franchises, it has not had a single red-lining complaint. The simple truth is that build-out requirements are not needed to protect the public from red-lining.
31. The primary point I hope to demonstrate with the above examples is that the local cable franchising process is much too slow, inefficient, contentious, uncertain and subject to the vagaries of local politics to be used as an effective public policy tool to promote the benefits of video competition and increased investment in broadband communications systems in the United States. Local Franchising Authorities should not be determining via the franchising process the business terms, conditions or timing of the entry of new wireline competitors in cable service markets. Nor should local governments be determining who is entitled to enter those markets or the pace at which such competitors can or will invest in new broadband technologies that will bring American consumers an array of new multi-media services that do not exist today and a choice in service providers.

I declare that the foregoing is true and correct to the best of my knowledge.


Thompson (Tom) T. Rawls II

Subscribed and sworn to before me

This 9th day of February, 2006

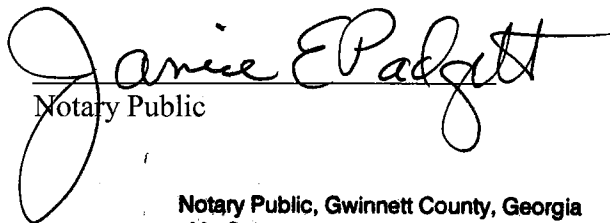

Notary Public
Notary Public, Gwinnett County, Georgia
My Commission Expires Feb. 19, 2008

Exhibit A**BEI Franchise Applications**

Franchise*	Application filed	Franchise granted	Approximate application pending time (in months)
ALABAMA			
Vestavia Hills	No record	10/2/95	N/A
FLORIDA			
Broward County	8/23/96	2/11/97	5.5
Coconut Creek	7/17/96	2/27/97	7.5
Miami-Dade County	7/15/96	4/15/97	9
Davie	7/17/96	12/16/98	29
Orange County	6/20/96	10/20/98	28
Orlando	6/19/96	12/2/96	5.5
Pembroke Pines	7/17/96	8/26/97	13.5
Seminole County	6/19/96	10/8/96	3.5
St. Johns County (World Golf Village) (Extended Area)	6/27/95 12/10/96	12/12/95 3/13/98	5.5 15
GEORGIA			
Chamblee	2/26/96	4/16/96	2
Cherokee County	6/25/96	8/13/96	1.5
Cobb County	9/27/96	6/3/99	32
DeKalb County	6/24/96	11/27/96	5
Duluth	No record	7/28/97	N/A
Gwinnett County	5/17/96	12/3/96	6.5
Lawrenceville	7/10/96	1/3/97	6
Roswell	7/3/96	9/12/96	2.5
Woodstock	6/11/96	7/23/96	1.5
TENNESSEE			
Bartlett	7/17/96	10/28/96	3.5

Overall average: 10 months
Florida average: 12 months
Georgia average: 7 months

Shortest application time: 1.5 months
Longest application time: 32 months

*Includes active and inactive franchises

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of Section 621(a)(1) of)	
The Cable Communications Policy Act of)	MB Docket No. 05-311
1984 as amended by the Cable Television)	
Consumer Protection and Competition)	
Act of 1992)	
)	

DECLARATION OF LYLE DOUGLAS (DOUG) STARCHER

1. This Declaration is being filed to provide information regarding BellSouth's plans to upgrade its broadband access networks in order to provide an array of advanced services, including a video offering that will be used by BellSouth to compete in the cable television market.

2. I am currently employed at BellSouth as a Member of the Technical Staff within BellSouth's Science and Technology division. I have a Bachelors degree in Civil Engineering from the University of Kentucky and over eighteen years of experience in the telecommunications industry. I am also a registered Professional Engineer in the state of Kentucky. I joined BellSouth in 1987 and have held numerous engineering related positions including Central Office Switch Traffic Engineering, Outside Plant Engineering, Video and Network Planning. I was most recently assigned to our Technical Staff supporting voice, video and data network transport. I have over ten years experience working with video transport architectures covering interlata, intralata, and

local access video networks to support BellSouth's ventures into Hybrid Fiber Coaxial (HFC) Networks, Multichannel Multipoint Distribution Service (MMDS), Fiber to the Curb (FTTC), Satellite Direct to the Home (DTH) and most recently Internet Protocol Television (IPTV). In my current position, my responsibilities include evaluating transport architectures, writing company policy letters conveying technology deployment directives, Request for Proposal (RFP) development and analysis, providing business case input, economic analysis of transport alternatives, and general staff support to BellSouth's network planners.

3. BellSouth is currently investing significant capital to upgrade its broadband access networks. In the broadband market place, service providers are currently offering 15Mbps and higher Internet access products to residential and small business subscribers. In order to respond to competition, BellSouth must upgrade its existing access networks to support a new generation of broadband technologies. These upgrades are not driven by a single application, but rather are the result of market pressures across an entire set of broadband applications.

4. BellSouth has undertaken a project called 'Competitive Broadband' (or "CBB") with the aim of upgrading the access network and core network infrastructure to position BellSouth to meet the needs of the quickly changing broadband market place. CBB provides a single common infrastructure which BellSouth will use to provide all of its IP based services (e.g. Internet access, VoIP, IP gaming, home monitoring, and video). BellSouth's video offering is an IPTV service, which entails the transport of video signals in IP packets including unicast (e.g. video on demand) and/or multicast services. Accordingly, this IPTV service has interactive components. Video on Demand (VoD)

services are becoming increasingly popular in the market place and are forecasted to drive a majority of the future capacity increases in the network.

5. The upgrades to BellSouth's networks described below all are for the general purpose of increasing the bandwidth of the network to allow the provision of advanced services. These upgrades are to support all advanced services, including video. In many instances, these upgrades are not specific to any given service, and it is not possible to distinguish the upgrades to provide greater bandwidth that will support video services as opposed to other advanced services.

6. This expansion to the bandwidth of the networks is generally accomplished by 1) adding electronic equipment in BellSouth's central offices, 2) adding equipment to BellSouth-owned structures (remote terminal cabinets, huts, etc.) other than central offices or 3) adding additional fiber strands placed in the public or private right of way. None of these changes will result in BellSouth's expanding its use of the public right of way beyond the current use. There may be instances in which additional equipment will need to be added in the public right of way. When this occurs, however, the placement of the equipment is required for the general upgrade of the broadband network, not for any reason specific to video service.

7. The competitive broadband project entails upgrades to the access network and to the core infrastructure, both of which will be used to support a variety of broadband applications. The portions of the Broadband Access Network being upgraded include 1) fiber to the curb, 2) the copper-based ADSL Network and 3) The Core Network.

Access Network

8. Fiber to the Curb (FTTC): BellSouth's fiber to the curb network today can support DSL maximum speeds ranging from 1.5 to 6 Mbps depending on the version of FTTC that has been deployed. With BellSouth's Competitive Broadband initiative, speeds of 50 Mbps and higher can be achieved with the upgrades as outlined below. Once these network enhancements have been completed, no further access upgrades are required to offer video service to our customer base.

a. Fiber Feeder Facilities: The current feeder fiber facilities are comprised of a Time Division Multiplexed (TDM) transport. TDM transport is a method for transmitting a number of unique signals simultaneously over a single communications medium by interleaving a portion of each signal in sequence. This transport supports our current POTS and DSL service offerings today. For BellSouth's Competitive Broadband initiative, a Gigabit Ethernet (GigE) facility will be provisioned from the Edge Aggregation Router (EAR) in the Central Office to the remote terminal (RT) site over fiber facilities. If spare fiber strands are not available in the existing fiber sheath, then Wavelength Division Multiplexing (WDM) or Coarse Wavelength Division Multiplexing (CWDM) would be deployed. Wavelength Division Multiplexing combines some number of signals (the number depends on the type of WDM) and transmits them at different wavelengths through the same fiber. In limited applications, new fiber will be constructed where other forecasted demands and the CBB upgrades exceed the current facilities. When video services are added, no additional GigE facilities

will be required. As the serving area increases both in size and customer base, additional GigE facilities may be added to meet the additional bandwidth requirements of the broadband network and the supported IP applications (e.g. Internet access, VoIP, Gaming, IPTV). The GigE will be a shared facility that will carry all IP applications, including video.

b. Remote Terminal (RT): At the RT site, which is usually placed on private right-of-way, several upgrades are required for CBB. Mechanical upgrades including power plant enhancements and potentially a backup generator may be needed. In addition, an Ethernet switch, new optical interfaces, and other plug-ins will be required. Once these upgrades have been completed for CBB, no additional work at the RT will be required to support a video service offering.

c. Distribution Fiber: No additional work is required to upgrade the distribution fiber facilities to support CBB or IPTV/video.

d. Optical Network Unit (ONU): The Optical Network Unit will require upgrades to support competitive broadband. Optical Interface circuit packs will be replaced as well as other circuit packs. In some cases, the ONU pedestal “shell” will need to be replaced to improve heat dissipation capabilities. It is at the ONU where the service providers DSL modem functionality resides. As part of the CBB project, these modems will be upgraded from legacy ADSL modems to ADSL2+ or VDSL2

modems enabling higher data rate services into the home. No additional upgrades will be re required at the ONU for a video service offering.

e. Twisted Pair Copper Drop: No upgrades are required to the twisted pair copper drop from the ONU to the NID. For the FTTC architecture, this drop is less than 500 feet in length. The DSL modulation takes place over the twisted pair drop into the home, which enables broadband signals into the home. This underlying DSL facility is required to support any of the IP services provided to the customer. No video specific upgrades are required.

9. Copper based ADSL Network: The currently deployed DSL network supports customer offering up to 6 Mbps with Serving Areas up to 18 kilofeet (KF) from the Digital Subscriber Line Access Multiplexer ("DSLAM"). To support the greater DSL speeds that will be required to keep pace with competition, the network upgrades outlined below will be required in various sections of the Outside Plant.

a. Plant Resectionalization: To facilitate the higher speed DSL offerings, BellSouth will resectionalize the distribution plant serving area to a 5 KF area. That is, new remote DSLAMs will be placed to shorten the copper cable distances from the DSLAM to the customer. This effort will be completed as a part of competitive broadband deployments, and will not include any specific changes to support video.

b. Central Office DSLAMs: New IP fed DSLAMS will be deployed in central offices where CBB will be located. A GigE will be

provisioned from the EAR to the DSLAM within the office to support the upgraded broadband network. Today, central office DSLAMs are fed with either Asynchronous Transfer Mode (“ATM”) based DS3 or OC3. Once the IP fed DSLAM has been provisioned, then no additional upgrades are required to support video service. Additional GigE(s) to the DSLAM may be provisioned at a later date as dictated by bandwidth demands.

c. Remote DSLAMs: Similar to CO DSLAMs, new IP fed DSLAMs will be deployed at remote sites to support enhanced broadband offerings. A GigE will be provisioned from the EAR to the remote DSLAM using fiber in the Outside Plant network. Some existing remote terminal DSLAMs (which are currently fed with either ATM based T1 or DS3) will be converted to IP fed DSLAMs. Once the IP fed DSLAM has been provisioned, no additional upgrades are required to support video services. Additional GigE(s) to the DSLAM may be provisioned at a later date as dictated by bandwidth demands to support the variety supported IP applications’ that will be offered (e.g. Internet access, VoIP, Gaming, IPTV).

d. Fiber Feeder Facilities: The current deployment scenario involves feeder facilities comprised of a Time Division Multiplexed (TDM) transport. This transport would support our current DSL service offerings. In the case of a T1 fed DSLAM, the site may be fed by copper pairs. These sites would be upgraded with fiber facilities to facilitate a conversion to IP to support broadband. Existing DS3 fed DSLAMs would

already have fiber to the RT site and would be upgraded from ATM to IP. For BellSouth's Competitive Broadband initiative, a GigE will be provisioned from the Edge Aggregation Router (EAR) in the Central Office to the remote terminal (RT) site over fiber facilities. If spare fiber strands are not available in the existing fiber sheath, then Wavelength Division Multiplexing (WDM) or Coarse Wavelength Division Multiplexing (CWDM) would be deployed. When video services are added, no additional GigE facilities will be required. As the serving area increases both in size and customer base, then additional GigE(s) may be added for the additional bandwidth requirements needed to support the various IP applications discussed above. The GigE will be a shared facility that will carry all IP applications, including video.

e. Copper Distribution Facilities: As mentioned previously, serving areas will have to be resectionalized to support CBB initiatives. Once the serving area loop lengths have been shortened for CBB's ADSL2+ offering, then no further changes would be needed to support IPTV. Where the copper distribution plant is near capacity and pair bonding is needed to support a broadband application, the copper cable may need reinforcement. This would be a rare occurrence given the capacity of our existing distribution plant and the recent trend of disconnecting lines used for dialup data as DSL services became popular.

f. Twisted Pair Copper Drop: No upgrades are required to the twisted pair copper drop from the curbside serving terminal to the NID.

The twisted pair drop into the home is part of the copper loop over which the DSL modulation takes place enabling broadband signals into the home. This underlying DSL facility is required to support any of the IP services we provide to the customer. No video specific upgrades are required.

10. Core Network: BellSouth's core network provides a single infrastructure for all IP applications to utilize. The core network can be broken down into two major areas; the intra LATA/metro inter office facilities (IOF) and the inter LATA transport facilities.

a. Metro Inter Office Facilities (IOF): Legacy IOF facilities utilized ATM DS3, OC-3, or OC-12 facilities to support broadband access. Within each metropolitan area, the broadband enhancement plan includes upgrading the interoffice facilities to GigE and 10G Ethernet to support the higher DSL bit rates provided to the end user. These facilities are shared across all of the IP applications supported by CBB.

Specifically, one or more GigE links or 10 GigE links will be deployed from the Broadband Aggregation Router (BAR) to the Edge Aggregation Router (EAR) and for EAR to EAR connections. Both devices will reside in a Central Office. The BAR is used to aggregate all IP traffic within the metro. Video on demand content will be the primary driver for significant video bandwidth demands. In addition, VHO to BAR Ethernet links will be required when video services are to be offered in order to transport the video signals to every VSO within the metropolitan area.

b. Inter LATA transport: BellSouth's inter LATA network is an optical transport network that is utilized to carry all inter LATA traffic; both IP and TDM based traffic. This network leverages DWDM to allow a common fiber facility to provide multiple logical transport streams. This network is used to interconnect the IP network that provides Internet access for the BellSouth region and this same shared infrastructure may also be used to provide transport services for the IPTV application between major data centers (i.e. Super Headend office and metro level/Video Hub offices). This DWDM infrastructure is currently in progress of being constructed to support other internal transport needs regardless of whether or not video services utilize these facilities. The GigE(s) transporting video could be deployed over an existing wavelength, should capacity exist, or may be deployed on a new wavelength.

Video Infrastructure

11. BellSouth will have to build some video specific infrastructure in order to support both broadcast and unicast (VoD) video services. The three main building blocks of the video network are the Super Headend (SHE), Video Hub Office (VHO) and the Video Serving Office (VSO). The architecture is comprised of a single SHE, and possibly a redundant SHE, which will feed national broadcast and video on demand content to multiple remote video hubs that will serve one or more metropolitan areas. The video hubs provide to the video serving office the combined local and national content along with any unicast demands.

a. Super Headend (SHE): The Super Head End (SHE) is responsible for acquiring content, encoding and transmitting it to the rest of the network. The Super Headend will consist of several subsystems that provide: national broadcast content reception, signal processing, encoding/encryption and IP encapsulation, VoD asset management, control system, billing system interface, and GigE optical network interface. The national broadcast and video on demand content will be transported from the SHE to the video hub office over our regional DWDM network. The Super headend will physically reside in a “non Central Office” environment.

b. Video Hub Office (VHO): The VHO will serve as the interface for the broadcast and unicast video demands of each metro. The national content from the SHE will be combined with the local channels to form the broadcast offer for that particular market as well as provide the video on demand content via the servers resident in the VHO. However, in a video on demand only implementation, the VoD servers could be placed in a central office within the metro, likely at a BAR location, instead of a VHO, thus eliminating the need for a VHO. Video only traffic will then be transported to the BARs within the metro(s) served by the video hub office. The VHO will physically reside in a “non Central Office” environment.

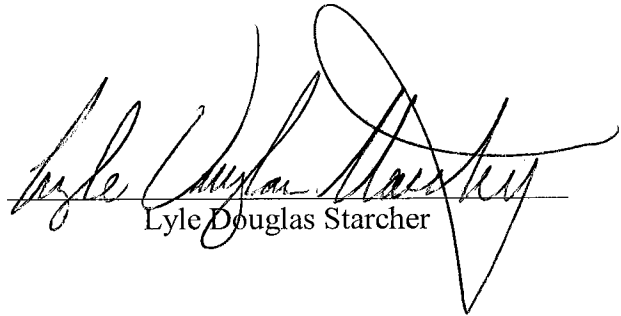
c. Video Serving Office (VSO): Video Serving Offices are generally Central Offices that are capable of offering video services that have already been upgraded with an Edge Aggregation Router (EAR) to

support CBB. The EAR serves as the head of the local access networks.

Though not envisioned for initial implementations, it is anticipated that the VSO will eventually house VoD servers, as well, when the scale of the service dictates distribution of those servers.

12. This concludes my Declaration.

I, Lyle Douglas Starcher, hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge, information, and belief.



Lyle Douglas Starcher

Dated: February 10th, 2006